Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-24–12 OF 2021(P) AND 01(f)-25–12 OF 2021
NALLINI PATHMANATHAN, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN FCJJ
20 JANUARY 2023

Land Law — Planning permission — Granting of — Local authority approved developer's application for planning permission — Appeal against grant of planning permission — Whether administrative guidelines were valid and consistent with Town and Country Planning Act 1976 ('the TCPA') — Whether utilisation of zoning implementation plan under repealed legislation was valid and lawful under TCPA — Whether there was duty to give reasons — Whether there was compliance with State Planning Committee's duty to obtain advice from National Physical Planning Council under s 22(2a) of the TCPA — Whether planning permission had contravened or breached provisions of TCPA and Land Conservation Act 1960

These two appeals brought by the appellants was against the decision of the Court of Appeal in rejecting the appeal to have the planning permission granted by Majlis Bandaraya Pulau Pinang ('the local authority') set aside. Sunway City (Penang) Sdn Bhd ('Sunway'), as a developer and the registered owner of the subject land, applied to the local authority for planning permission to have the subject land utilised for a housing development project. Approximately 43% of the subject land on which the project was to be developed comprised of hill land. The local authority served the relevant neighbouring owners, including the appellants, notice of their right to object to Sunway's application for planning permission. The appellants and other neighbouring landowners objected to Sunway's application and a meeting was convened by the local authority in order to 'hear' the appellants and all persons who had lodged an objection and who sought a hearing. The appellants and other neighbouring landowners did not hear after that from the local authority with regard to the objections they had made in relation to the proposed development and why these objections failed. Subsequently, the local authority granted planning permission to Sunway and informed the appellants and the neighbouring landowners and advised them of their right to appeal against the decision to grant approval for the development to the Penang State Planning Appeal Board ('the Appeal Board'). No reasons were given by the local authority for the decision, nor why the objections had been found to be without basis or merit. The appellants appealed to the Appeal Board and the planning permission was set aside. Sunway then filed the judicial review

proceedings at the High Court, seeking to quash the decision of the Appeal Board and succeeded in doing so. The High Court determined that the proposed development fell within the purview of a narrow trio of exceptions falling outside the strong prohibition against development on hill slopes under the Penang Structure Plan 2020 ('Structure Plan') which was issued by the State Planning Committee vide administrative guidelines entitled 'Special Projects under the Penang Structure Plan 2020' ('the Special Projects Guidelines'). The High Court further held it was valid for the State Planning Committee to issue a direction to the local authority which allowed the local authority to ascertain whether a proposed project fell within either exception without further reference to the State Planning Committee. The appellants appealed against the decision of the High Court which was upheld by the Court of Appeal. The Court of Appeal in its reasoning essentially adopted the reasoning and conclusions of the High Court and affirmed the same. Hence, these appeals. The issues for consideration were: (a) whether the Special Projects Guidelines were valid and consistent with the statutory provisions of the Town and Country Planning Act 1976 ('the TCPA'); (b) if the Special Projects Guidelines were valid, what was its relationship to the Structure Plan and what interpretation ought to be accorded to these guidelines; (c) whether utilisation of a zoning implementation plan ('Pelan Dasar') or the 1996 Interim Zoning Plan under the repealed legislation, was valid and lawful under the provisions of the TCPA; (d) the meaning of the right to be heard under to s 21(7) of the TCPA; (e) whether there was compliance with the State Planning Committee's duty to obtain advice from the National Physical Planning Council ('NPPC') under s 22(2a) of the TCPA; and (f) whether the planning permission had contravened or breached the provisions of the TCPA and the Land Conservation Act 1960 ('the LCA').

Held, allowing the appeals with costs:

(1) The drafting, approval and issuance of the Special Projects Guidelines was in contravention of the express provisions of the TCPA. The issuance of these guidelines amounted to a variation or alteration of the Structure Plan in material aspects and so contravened ss 11, 11A and 11B of the TCPA which collectively required that any such variation to a gazetted Structure Plan must go through the process of ensuring public participation and public awareness of the proposed amendment. In the absence of any such empowering statutory provision, it followed that the working committee in embarking upon and implementing the Special Projects Guidelines was acting ultra vires its capacity and powers under the TCPA. As such the Special Projects Guidelines were invalid and devoid of any effect because they were not premised on any statutory basis and were contrary to the express provisions of the TCPA, in light of ss 11, 11A and 11B of the TCPA (see para 158).

(2) The High Court and Court of Appeal erred in law in finding that the Pelan Dasar could be treated as a local plan and, following this conclusion, that the 1996 directive was intra vires. The 1996 directive was ultra vires the State Planning Committee's power under s 4(5) of the TCPA. The Pelan Dasar was not, in any way, equivalent in nature, substance or effect as a local plan under the TCPA. The attempt to accord the Pelan Dasar the same status as a local plan was clearly a contravention of the TCPA. Further, the substance of the Pelan Dasar failed to conform with the Structure Plan, in particular the latter's general prohibition of housing development on hill slopes (see paras 169 & 174).

(3) There was nothing to indicate that any reference was submitted to the NPPC by the State Planning Committee. That was a statutory pre-requisite in the treatment of planning approval under s 22 of the TCPA. The direction given by the local authority to not make any further reference to the State Planning Committee contravened s 22(2A) of the TCPA, as the direction bypassed the express obligation on the State Planning Committee to request the advice of the NPPC. The direction given by the State Planning Committee was invalid and tainted by such non-compliance. The local authority, in relying and acting on such a tainted direction, acted in contravention of the TPCA in making its decision to grant planning permission pursuant to s 22(2A) of the TCPA (see paras 182 & 186).

(4) The continued use of the Pelan Dasar for which there was no provision in the TCPA, amounted to a contravention of the TCPA by the local authority. The local authority's continued use of the Pelan Dasar also contravened s 12 of the TCPA which required the local authority to prepare and have ready a draft local plan at the time of the preparation of the structure plan or as soon as practicable after it had come into effect. The use of the Pelan Dasar or the zoning plan produced under previous legislation which stood repealed at the time of this application for planning permission was invalid in law. It failed to conform with the Structure Plan and amounted to a contravention of the TCPA. The Structure Plan prevailed as the applicable statutory development plan for that area and other policies must conform to it. Section 4(5) of the TCPA afforded no remedy to the local authority as the contravention went to the root of the basis for the grant of planning approval. As it was premised on an invalid basis, it was similarly invalid and bad in law (see paras 199 & 208).

(5) The statutory provisions in ss 21(6) and (7) and 22(2) of the TCPA all required that the objectors were advised of the reasons for the final decision. The decision of the local authority involved development on hill lands, which the neighbouring landowners maintained, did not comply with, and possibly contravened the Structure Plan. It would

require very strong reasons for the local authority to deviate from the Structure Plan and it followed that affected persons ie the appellants, had a right to be told why the local authority considered the development as justified notwithstanding its adverse effect on the hill lands. The public interest element that was implicit in the TCPA required that the relevant decision maker ie the local authority, had considered matters properly and it came to the fore in a case such as this where the grant of planning permission was a departure from the Structure Plan and the general policy of the preservation of hill lands and hill slopes. That in itself warranted the giving of reasons for such departure. Apart from the clear statutory intent expressed in ss 21(6), (7) and 22(2) of the TCPA, it was also important in the context of the good and bona fide administration of local authorities for reasons to be given. Therefore, the deviation from the Structure Plan, reliance on committee drafted definitions outside the purview of the TCPA and deviation from national policy required that reasons should have been given, inter alia, to the appellants for the local authority's decision to grant planning permission to Sunway for its development (see paras 235–239).

(6) Sunway could not shield itself from the application of the TCPA and LCA on the reason that the subject land was a first-grade freehold title without any restriction of land use. The absence of an endorsement on the land title, namely that there was no endorsement that the subject land was reserved as 'hill land' under the LCA, did not equate as a basis for creating a legitimate expectation that there would be no restrictions to the proposed development of the subject land. The State Authority was vested with the express statutory power under s 10 of the TCPA to approve and enact a Structure Plan, as well as under s 3 of the LCA to reserve an area of land as 'hill land'. The absence of an endorsement stipulating the relevant restrictions under the TCPA and LCA did not mean that there was a clear and unambiguous representation by the State Authority that the TCPA and LCA had no application, in particular that the reservation as 'hill land' under the LCA had no effect. The High Court and Court of Appeal erred in law in finding that Sunway had a legitimate expectation, and that land use stipulated in the title document superseded the application of the TCPA or the LCA. As such, the local authority's decision in the granting of planning permission prior to the excision of the subject land as 'hill land' was ultra vires and, hence, void (see paras 243, 246, 248 & 249).

[Bahasa Malaysia summary

Kedua-dua rayuan yang dibawa oleh perayu ini adalah terhadap keputusan Mahkamah Rayuan yang menolak rayuan supaya kebenaran merancang yang diberikan oleh Majlis Bandaraya Pulau Pinang ('pihak berkuasa tempatan') diketepikan. Sunway City (Pulau Pinang) Sdn Bhd ('Sunway'), sebagai pemaju

dan pemilik berdaftar tanah, memohon kepada pihak berkuasa tempatan untuk kebenaran merancang supaya tanah digunakan untuk projek pembangunan perumahan. Kira-kira 43% daripada tanah subjek di mana projek itu akan dibangunkan terdiri daripada tanah bukit. Pihak berkuasa tempatan menyampaikan notis kepada pemilik bersebelahan yang berkaitan, termasuk perayu, mengenai hak mereka untuk membantah permohonan Sunway untuk kebenaran merancang. Perayu dan pemilik tanah bersebelahan yang lain membantah permohonan Sunway dan satu mesyuarat telah diadakan oleh pihak berkuasa tempatan untuk 'mendengar' perayu dan semua orang yang telah membuat bantahan dan yang memohon pendengaran. Perayu-perayu dan pemilik tanah bersebelahan yang lain tidak mendengar apa-apa selepas itu daripada pihak berkuasa tempatan berkenaan dengan bantahan yang mereka buat berhubung dengan pembangunan yang dicadangkan dan mengapa bantahan ini gagal. Selepas itu, pihak berkuasa tempatan memberikan kebenaran merancang kepada Sunway dan memaklumkan perayu dan pemilik tanah bersebelahan serta menasihatkan mereka tentang hak mereka untuk merayu terhadap keputusan memberikan kelulusan bagi pembangunan itu kepada Lembaga Rayuan Negeri Pulau Pinang ('Lembaga Rayuan'). Tiada alasan diberikan oleh pihak berkuasa tempatan untuk keputusan itu, mahupun mengapa bantahan itu didapati tanpa asas atau merit. Perayu merayu kepada Lembaga Rayuan dan kebenaran merancang telah diketepikan. Sunway kemudian memfailkan prosiding semakan kehakiman di Mahkamah Tinggi, bertujuan untuk membatalkan keputusan Lembaga Rayuan dan berjaya berbuat demikian. Mahkamah Tinggi memutuskan bahawa pembangunan yang dicadangkan adalah dalam skop tiga pengecualian yang termasuk di luar larangan keras terhadap pembangunan di lereng bukit di bawah Rancangan Struktur Negeri Pulau Pinang 2020 ('Rancangan Struktur') yang dikeluarkan oleh Jawatankuasa Perancang Negeri melalui garis panduan pentadbiran bertajuk 'Projek Khas di bawah Rancangan Struktur Negeri Pulau Pinang 2020' ('Garis Panduan Projek Khas'). Mahkamah Tinggi seterusnya memutuskan adalah sah bagi Jawatankuasa Perancang Negeri mengeluarkan arahan kepada pihak berkuasa tempatan yang membenarkan pihak berkuasa tempatan untuk memastikan sama ada projek yang dicadangkan termasuk dalam mana-mana pengecualian tanpa merujuk lanjut kepada Jawatankuasa Perancang Negeri. Perayu merayu terhadap keputusan Mahkamah Tinggi yang dikekalkan oleh Mahkamah Rayuan. Mahkamah Rayuan dalam alasannya pada dasarnya menerima pakai alasan dan kesimpulan Mahkamah Tinggi dan mengesahkan perkara yang sama. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada Garis Panduan Projek Khas adalah sah dan konsisten dengan peruntukan berkanun Akta Perancangan Bandar dan Desa 1976 ('APBD'); (b) jika Garis Panduan Projek Khas adalah sah, apakah hubungannya dengan Rancangan Struktur dan apakah tafsiran yang perlu diberikan kepada garis panduan ini; (c) sama ada penggunaan pelan pelaksanaan pengezonan ('Pelan Dasar') atau Rancangan Pengezonan Interim 1996 di bawah perundangan yang dimansuhkan, adalah

sah dan mengikut undang-undang di bawah peruntukan APBD; (d) maksud hak untuk didengar di bawah s 21(7) APBD; (e) sama ada terdapat pematuhan dengan kewajipan Jawatankuasa Perancang Negeri untuk mendapatkan nasihat daripada Majlis Perancang Fizikal Negara ('MPFN') di bawah s 22(2a) APBD; dan (f) sama ada kebenaran merancang itu adalah bertentangan atau melanggar peruntukan APBD dan Akta Pemuliharaan Tanah 1960 ('APT'). A B

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Penggubalan, kelulusan dan pengeluaran Garis Panduan Projek Khas adalah bercanggah dengan peruntukan nyata APBD. Pengeluaran garis panduan ini berjumlah variasi atau pengubahsuaian Rancangan Struktur dalam aspek material dan dengan itu melanggar ss 11, 11A dan 11B APBD yang secara kolektif menghendaki sebarang perubahan sedemikian kepada Rancangan Struktur yang diwartakan mesti melalui proses memastikan penyertaan orang ramai dan kesedaran orang ramai terhadap cadangan pindaan. Dengan ketiadaan peruntukan berkanun yang memperkasakan sedemikian, ia berikutan bahawa jawatankuasa kerja dalam memulakan dan melaksanakan Garis Panduan Projek Khas bertindak ultra vires kapasiti dan kuasanya di bawah APBD. Oleh yang demikian, Garis Panduan Projek Khas adalah tidak sah dan tidak mempunyai sebarang kesan kerana ia tidak berasaskan mana-mana asas berkanun dan bertentangan dengan peruntukan nyata APBD, berdasarkan ss 11, 11A dan 11B APBD (lihat perenggan 158). C D E

(2) Mahkamah Tinggi dan Mahkamah Rayuan terkhilaf dalam undang-undang apabila mendapati bahawa Pelan Dasar boleh dianggap sebagai rancangan tempatan dan, berikutan kesimpulan ini, bahawa arahan 1996 adalah intra vires. Arahan 1996 adalah ultra vires kuasa Jawatankuasa Perancang Negeri di bawah s 4(5) APBD. Pelan Dasar bukanlah, dalam apa cara sekalipun, sifat, bahan atau kesan yang setara sebagai pelan tempatan di bawah APBD. Percubaan untuk memberikan Pelan Dasar status yang sama dengan rancangan tempatan jelas merupakan pelanggaran APBD. Selanjutnya, inti Pelan Dasar gagal untuk mematuhi Rancangan Struktur, khususnya larangan umum pembangunan perumahan di lereng bukit (lihat perenggan 169 & 174). F G H

(3) Tiada apa-apa yang menunjukkan bahawa sebarang rujukan telah dikemukakan kepada MPFN oleh Jawatankuasa Perancang Negeri. Itu adalah pra-syarat berkanun dalam proses kelulusan perancangan di bawah s 22 APBD. Arahan yang diberikan oleh pihak berkuasa tempatan untuk tidak membuat sebarang rujukan lanjut kepada Jawatankuasa Perancang Negeri bercanggah dengan s 22(2A) APBD, kerana arahan itu memintas kewajipan nyata Jawatankuasa Perancang Negeri untuk meminta nasihat MPFN. Arahan yang diberikan oleh Jawatankuasa Perancang Negeri adalah tidak sah dan dicemari oleh ketidakpatuhan I

tersebut. Pihak berkuasa tempatan, dalam bergantung dan bertindak atas arahan yang tercemar itu, bertindak bertentangan dengan APBD dalam membuat keputusannya untuk memberikan kebenaran merancang menurut s 22(2A) APBD (lihat perenggan 182 & 186).

(4) Penggunaan berterusan Pelan Dasar yang tidak terdapat peruntukan dalam APBD, adalah merupakan pelanggaran APBD oleh pihak berkuasa tempatan. Penggunaan Pelan Dasar yang berterusan oleh pihak berkuasa tempatan juga bercanggah dengan s 12 APBD yang memerlukan pihak berkuasa tempatan menyediakan dan menyiapkan draf rancangan tempatan pada masa penyediaan rancangan struktur atau secepat yang boleh dilaksanakan selepas ia berkuat kuasa. Penggunaan Pelan Dasar atau pelan pengezonan yang dihasilkan di bawah perundangan terdahulu yang telah dimansuhkan pada masa permohonan untuk kebenaran merancang ini adalah tidak sah di sisi undang-undang. Ia gagal mematuhi Rancangan Struktur dan merupakan pelanggaran APBD. Rancangan Struktur diguna pakai sebagai pelan pembangunan berkanun yang terpakai untuk kawasan itu dan dasar lain mesti mematuhinya. Seksyen 4(5) APBD tidak memberikan sebarang remedi kepada pihak berkuasa tempatan kerana pelanggaran itu menjadi punca kepada pemberian kelulusan perancangan. Memandangkan ia didasarkan pada asas tidak sah, ia juga tidak sah dan salah di sisi undang-undang (lihat perenggan 199 & 208).

(5) Peruntukan berkanun dalam ss 21(6) dan (7) dan 22(2) APBD semuanya menghendaki pembantah dinasihatkan tentang sebab keputusan muktamad. Keputusan pihak berkuasa tempatan melibatkan pembangunan di tanah bukit, yang pemilik tanah bersebelahan nyatakan, tidak mematuhi, dan mungkin melanggar Rancangan Struktur. Ia akan memerlukan alasan yang sangat kukuh untuk pihak berkuasa tempatan untuk menyimpang daripada Rancangan Struktur dan ia berikutan bahawa orang yang terjejas iaitu perayu, mempunyai hak untuk diberitahu mengapa pihak berkuasa tempatan menganggap pembangunan itu sebagai wajar walaupun kesan buruknya ke atas tanah bukit. Elemen kepentingan awam yang tersirat dalam APBD memerlukan pembuat keputusan yang berkaitan iaitu pihak berkuasa tempatan, telah mempertimbangkan perkara-perkara dengan betul dan ia menjadi perhatian dalam kes seperti ini di mana pemberian kebenaran merancang adalah penyimpangan daripada Pelan Struktur dan dasar am pemeliharaan tanah bukit dan lereng bukit. Itu sendiri mewajarkan diberikan alasan untuk penyimpangan tersebut. Selain daripada niat berkanun yang jelas dinyatakan dalam ss 21(6), (7) dan 22(2) APBD, ia juga penting dalam konteks pentadbiran pihak berkuasa tempatan yang baik dan bona fide untuk alasan perlu diberikan. Oleh itu, penyelewengan daripada Rancangan Struktur, pergantungan kepada definisi yang dirangka jawatankuasa di luar bidang kuasa APBD dan

penyelewengan daripada dasar negara memerlukan alasan sepatutnya diberikan, antara lain, kepada perayu untuk keputusan pihak berkuasa tempatan untuk memberikan kebenaran merancang kepada Sunway untuk pembangunannya (lihat perenggan 235–239).

(6) Sunway tidak dapat melindungi dirinya daripada penggunaan APBD dan APT atas alasan bahawa tanah subjek adalah hak milik pegangan bebas gred pertama tanpa sebarang sekatan penggunaan tanah. Ketiadaan pengendorsan ke atas hak milik tanah, iaitu tiada pengendorsan bahawa tanah subjek itu dikhaskan sebagai 'tanah bukit' di bawah APT, tidak menyamakan sebagai asas untuk mewujudkan jangkaan sah bahawa tidak akan ada sekatan terhadap cadangan pembangunan tanah. Pihak Berkuasa Negeri diberi kuasa berkanun nyata di bawah s 10 TCPA untuk meluluskan dan menggubal Rancangan Struktur, serta di bawah s 3 APT untuk merizabkan kawasan tanah sebagai 'tanah bukit'. Ketiadaan pengendorsan yang menetapkan sekatan yang berkaitan di bawah APBD dan APT tidak bermakna terdapat perwakilan yang jelas dan nyata oleh Pihak Berkuasa Negeri bahawa APBD dan APT tidak boleh diguna pakai, khususnya bahawa kawasan perlindungan sebagai 'tanah bukit' di bawah APT tidak mempunyai kesan. Mahkamah Tinggi dan Mahkamah Rayuan terkhilaf dari segi undang-undang dalam mendapati Sunway mempunyai jangkaan sah, dan penggunaan tanah yang dinyatakan dalam dokumen hak milik menggantikan penggunaan TCPA atau LCA. Oleh itu, keputusan pihak berkuasa tempatan dalam pemberian kebenaran merancang sebelum penyingkiran tanah sebagai 'tanah bukit' adalah ultra vires dan, oleh itu, tidak sah (lihat perenggan 243, 246, 248 & 249).]

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (not folld)

Agricultural and Processed Food v Oswal Agro Furan IR 1996 SC 1947, SC (refd)

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 3 MLJ 466; [2021] 4 CLJ 775, FC (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor [2019] 3 MLJ 671; [2019] 3 CLJ 593, CA (distd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2022] 1 MLJ 1; [2021] 2 MLRA 190, FC (refd)

Gokool v Permanent Secretary for the Ministry of Health and Quality of Life [2008] UKPC 54, PC (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors

A *Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123, FC (refd)

Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another; Cheshire East Borough Council v Secretary of State for Communities and Local Government and another [2017] 4 All ER 938, SC (distd)

B *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116, CA (refd)

Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp [2020] 12 MLJ 16; [2020] 10 CLJ 285, FC (refd)

C *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590, FC (refd)

M v Home Office [1992] QB 270, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbeguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (not folld)

D *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554, CA (folld)

Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd [2021] 6 MLJ 348; [2021] 8 CLJ 409, FC (refd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337; [1999] 2 CLJ 471, FC (refd)

E *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 4 CLJ 729, FC (refd)

Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71, CA (refd)

F *Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997, HL (refd)

Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1, CA (refd)

R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245, SC (refd)

G *R (on the application of CPRE Kent) v Dover District Council and another* [2017] UKSC 79, SC (distd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

H *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, HL (refd)

Simpson v Edinburgh Corporation [1960] SC 313, SC (refd)

Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581; [2007] 5 CLJ 673, FC (distd)

Tenaga Nasional Bhd v Majlis Daerah Segamat [2022] 2 MLJ 119; [2022] 2 CLJ 497, FC (distd)

I *The Attorney General and others v Sligo County Council* [1991] 1 IR 99 (refd)

The Ordinary Co Sdn Bhd v Lembaga Rayuan Negeri Selangor & Anor [2014] 7 MLJ 705, HC (refd)

Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai [2020]

1 MLJ 211; [2020] 1 CLJ 34, FC (refd)
Westminster City Council v Great Portland Estates Plc [1985] AC 661, HL (folld)

Legislation referred to

Commission of Enquiry Act 1950
Environment Quality Act 1974
Federal Constitution arts 74(1), 76(4), 80(2), Ninth Schedule, List III
Interpretation Acts 1948 and 1967 s 17A
Land Conservation Act 1960 ss 3, 5, 6
Local Government Act 1976 ss 129, 145(1)
National Land Code s 108
Planning and Compulsory Purchase Act 2004 [UK]
Rules of Court 2012 O 53 r 3(2)
Sanitary Boards Enactment (FMS Cap 137)
Strata Management Act 2013 s 70
Street Draining and Building Act 1974
Town and Country Planning Act 1976 ss 2, 2A, 2A(1), 2B, 4, 4(4), (5), 7, 8, 8(3), (3)(c), 9, 9(2), 10, 10(3), (3)(a), (3)(b), (4), (7), 11, 11(1), (2), 11A, 11B, 11B(2), (4), (5), (6), (7), 12, 12(1), (2), (8), 12A, 13, 14, 14(1), 15, 15(5), (6) , 16, 20, 20(a), 20A, 21, 21(1), (3), (5), (6), (7), 22, 22(1), (2), (2)(aa), (2)(c), (2A), (2A)(c), (4), (4)(aa), 23, 23(1)(b), 22(4)(a), 36, 36(13), 56, Part II, Part III
Town Planning Enactment 1923
Town Planning Enactment 1927
Town Boards Enactment (Cap 137)
Town and Country Planning (Scotland) Act 1947 [UK] s 9
Town and Country Planning Act 1971 (repealed by Town and Country Planning Act 1990) [UK] ss 31(1), 244(1), Schedule 4, para 11(2)
Town and Country Planning Act 1990 [UK]
Trade Union Act 1959 s 12

Appeal from:*Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2021] MLJU 3121 (Court of Appeal, Putrajaya)

Gurdial Singh Nijar (with Meenakshi Raman, Jessica Ram Binwani, Ramitra Ramarao, Abraham Au Tian Hui) (Kanesh Sundrum & Co) in Civil Appeal Nos 01(f)-24–12 of 2021(P) 01(f)-25–12 of 2021 for the appellant.
Cyrus Das (with Christina Siew and Wang Kang Le) (Lim Kean Siew) in Civil Appeal Nos 01(f)-24–12 of 2021(P) 01(f)-25–12 of 2021 for the first respondent.
Karin Lim Ai Ching (with Murgan a/l D Maniam) (Presgrave & Matthews) in Civil Appeal Nos 01(f)-24–12 of 2021(P) 01(f)-25–12 of 2021 for the second respondent.

Charanjit Singh a/l Mahinder Singh (Pejabat Penasihat Undang-Undang Negeri Pulau Pinang) in Civil Appeal Nos 01(f)-24–12 of 2021(P) 01(f)-25–12 of 2021 for the third respondent.

Kam Suan Pheng (with Chee Heng Lee) watching brief for Penang Hills Watch.

Lim Mah Hui (with Zulfikar Aziz) watching brief for Penang Forum.

Cynthia Gabriel watching brief for Center to Combat Corruption & Cronyism (C4).

Nallini Pathmanathan FCJ:

I. INTRODUCTION

[1] These two appeals concern the law relating to planning approvals, more particularly, in relation to development on hill land and steep slopes in the state of Penang. This is a matter of significance because development on hillslopes is intrinsically related to sustainable development in the context of environmental law. It brings to the fore the need for a holistic approach in decision making in relation to property development, particularly on hill land and steep slopes as, notwithstanding legislation in this regard, sustainability of development has not necessarily been ensured. The governance of property development requires constant vigilance and a holistic approach in decision making by the relevant authorities.

II. APPEAL HISTORY

[2] There are two appeals before the Federal Court brought by the Perbadanan Pengurusan Sunrise Garden Kondominium (Civil Appeal Nos 01(f)-24–12 of 2021 (P) and Sim Khoo Tneah Seng and Goon Swee Keng 01(f)-25–12 of 2021(P)) ('appellants') against the decision of the Court of Appeal, rejecting the respective appellants' appeal to have the planning permission granted by the local authority, Majlis Bandaraya Pulau Pinang ('the local authority') set aside. The Court of Appeal in reaching its decision, affirmed the decision of the High Court.

[3] The history of these appeals commenced with appeals brought by the appellants to the Lembaga Rayuan Negeri Pulau Pinang or the Penang State Planning appeal board ('the appeal board'), against the decision of the local authority dated 21 February 2012, granting planning permission, to Sunway City (Penang) Sdn Bhd, the registered owner of the subject land, and also the developer for the construction of a housing development project of 600 units of housing. The proposed development envisages 13 blocks of condominiums, three storey bungalows as well as other structures over a total area of 80.89 acres ('Sunway'), 43% of which comprises hill land.

[4] The appeal board, vide a decision dated 20 November 2015, set aside the planning permission dated 21 February 2012, granted by the local authority to Sunway.

[5] Sunway then filed the judicial review proceedings in the High Court at Penang, seeking to quash the decision of the appeal board and succeeded in doing so. Pared down to its essence, the High Court determined that the proposed development fell within the purview of a narrow trio of exceptions falling outside the strong prohibition against development on hill slopes under the Penang Structure Plan 2020, which was *gazetted* on 28 June 2007. This narrow coterie of exceptions was issued by the State Planning Committee in May 2009 vide administrative guidelines entitled 'Special Projects under the Penang Structure Plan 2020' ('the special projects guidelines').

[6] The High Court construed the third category of exceptions as a standalone exception, which was to be read disjunctively as a discrete, disconnected and distinct category, completely separate from the other exceptions. The High Court further held it was valid for the State Planning Committee to issue a direction to the local authority which allowed the local authority to ascertain whether a proposed project fell within either exception without further reference to the State Planning Committee. The result of such an interpretation was to effectively accord the local authority and the planning authorities, the discretion to determine, in any given case, whether a proposed hillside development, such as the present which relates to housing, could proceed or not.

[7] The appellants appealed against this decision of the High Court which was upheld by the Court of Appeal. The Court of Appeal in its reasoning essentially adopted the reasoning and conclusions of the High Court and affirmed the same. Leave to appeal against the decision of the Court of Appeal was granted on 30 November 2021.

[8] The central issue in these appeals relates to the validity of the planning approval granted by the local authority in relation to the housing development on hillside land, and whether the appeal board had erred in law or fact in setting aside the said approval. The main statute governing planning approvals is the Town and Country Planning Act 1976 ('the TCPA') and our judgment will focus on the relevant provisions of the TCPA and their purport. Arising from this central issue are several legal issues, such as the interpretation of the relevant provisions of the TCPA and the subsidiary or delegated legislation arising therefrom, the Penang Structure Plan 2020, the guidelines promulgated by the State Planning Committee to give effect to planning approval, as well as the interplay between the National Land Code, the TCPA and the Land Conservation Act 1960. These issues are encompassed in the 12 leave questions

A before the court, which are set out in para 250 of in this judgment.

III. THE SUBJECT LAND

B **[9]** The chronology of relevant events and facts are essential to comprehend the issues involved in these appeals. Prior to that it is necessary to understand the location, lay and nature of the subject land.

C **[10]** The subject land is held under Geran No 81977 and is described as Lot 14345, Mukim 12, Daerah Barat Daya, Penang. The subject land falls under the category of 'First Grade title land' with no restriction of land use under the National Land Code. It measures 80.89 acres or 327,361.83 sq mt and is located within the Sungai Ara/Bayan Lepas area.

D **[11]** Approximately 43% of the subject land on which the project is to be developed:

(a) enjoys an elevation in excess of 76 metres above sea level; and

(b) has a gradient exceeding 25 degrees.

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[12] The said land was also declared as 'hill land' under s 3 of the Land Conservation Act 1960 since 9 August 1940 vide *Gazette* Notification Number 2744 .

F (IV) RELEVANT BACKGROUND FACTS

[13] We set out the relevant facts and events premised in part on the submissions of the parties and the judgments of the courts below, which we gratefully adopt. We have also set out the relevant law to enable a G comprehension of how the law fits in with the events that took place culminating in the approval granted by the local authority to Sunway.

[14] Since 9 August 1940, the subject land was declared to be 'hill land' under s 3 of the Land Conservation Act 1960 ('the LCA'). The LCA is H legislation relating to, inter alia, the conservation of hill land and the protection of soil from erosion. The effect of being designated as hill land under the LCA is that no person may clear any hill land or interfere with or destroy or remove the vegetation from such land save as authorised by the Land Administrator for the purposes of cultivation or clearing and weeding (see ss 5 and 6 of the LCA).

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[15] Therefore, until excision was fully effected, the said hill land was protected land and development prohibited. This is a relevant factor because it indicates how the subject land was viewed in the context of land conservation, prior to the proposed development and planning provision.

(A) Pelan dasar

[16] In 1996, a zoning implementation plan known as the 'Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP/PN-020(PL/PP)' ('Pelan Dasar') was approved by the State Planning Committee for utilisation by the local authority for zoning purposes.

[17] In the *Pelan Dasar*, a part of the subject land is zoned as 'Perumahan Am' or residential/housing zone, while the other part of the subject land is zoned as 'Perumahan Ketumpatan Rendah' or low cost housing. This document is of significance because it comprises the primary basis for the grant of planning approval for the development.

[18] The *Pelan Dasar* was utilised by the local authority to substitute the Interim Zoning Plan No 1/1973 and Land Use Policy Plan MDLBPP No 1, Sek 1, 2 and 3/1974 which were formulated under legislation that has now been repealed. The *Pelan Dasar* was to be used by the local authority to determine land use until a local plan was produced. However, no local plan was ever drawn up by the local authority despite the Penang Structure Plan 2020 being *gazetted* in June 2007 and the express provision of s 12 of the TCPA which envisaged that work on the local plan ought to commence before or soon after the Penang structure plan comes into effect.

[19] In short, the local authority determined zoning based on a zoning plan produced pursuant to legislation that had been repealed. The local authority stipulates that it was merely following a directive by the State Planning Committee issued in October 1996 purportedly pursuant to s 4(5) of the TCPA.

(B) Penang Structure Plan 2020

[20] On 28 June 2007 the Penang Structure Plan 2020 (*Rancangan Struktur Negeri Pulau Pinang 2020*) ('structure plan') was *gazetted* by the state authority in line with s 10(7) of the TCPA. The structure plan contains the primary policy of the state authority and reflects the development plan for the State.

[21] Paragraph 4.5.2 of the structure plan contains policies relating to 'Hill Land' in Penang. It defines 'Hill Land' as land situated 76 metres or 250 ft above sea level. That describes 43% of the subject land. The overarching objective of policies relating to hill land is stated as follows:

> The high pressure of development on the Island has resulted in areas of hill land exceeding 76 meters (250 ft) to become increasingly threatened. The gazettement of hill land as reserved areas as well as the enforcement of planning guidelines and the

A control of hill land are necessary to ensure that the area continues to be conserved in order to maintain ecological balance in the State.

B **[22]** Pertaining to hill land, various policies are set out under 'Dasar Khusus 3' which is entitled as 'Hill Land Activity will be Controlled by Enforcing Guidelines on Risky or Sensitive Areas'. Further policies are set out thereunder, and enumerated as 'Dasar Khusus 3 Langkah 1' until 'Dasar Khusus 3 Langkah 9'.

C **[23]** Dasar Khusus 3 Langkah 1 (DK3 L1) of the structural plan finetunes the general preservation of hill lands as follows:

> Maintain the area exceeding level 76 metres (250 feet) and above as hill land/natural area including lands which is gazette under the Land Conservation Act 1960 (hill land gazette).

D **[24]** Dasar Khusus 3 Langkah 2 (DK3 L2) in the structure plan contains a general prohibition against any form of development including housing development. It provides as follows:

> Any municipality development including housing development, hotel, resort, commercial and industry; and agricultural activity is not permitted for:
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> (i) Highland areas which is gazetted under the Land Conservation Act 1960;
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> (ii) Any land which is located at a level exceeding 76 metres (250 feet); and/or
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> (iii) Lands with a slope or gradient exceeding 25 degrees.

F **[25]** Dasar Khusus 3 Langkah 3 (DK3 L3) requires land that has been given approval by authorities to be excised from its status as 'hill land' in the *gazette* must be subject to planning requirements and the guidelines for risky or sensitive areas used by the State.

G **[26]** Dasar Khusus 3 Langkah 4 (DK3 L4) provides the sole exception to 'Hill Land' cutting activity. This paragraph provides:

> Limited development for special projects in areas where the elevation is above 76 meters (250 feet) or exceeding requires strict control by complying with 'Guidelines on Development of Hill Land Area' and any guidelines which are determined by the Government; and to obtain EIA approval and obtain State Planning Committee approval.

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I **[27]** Dasar Khusus 3 Langkah 5 (DK3 L5) further requires compliance with planning requirements ('kehendak-kehendak perancangan') and the guideline on development on risky or sensitive areas used by the State.

[28] Dasar Khusus 3 Langkah 6 (DK3 L6) stipulates the following:

Gazette all ecologically and environmentally sensitive hill areas as hill land/natural areas. A

[29] Dasar Khusus 3 Langkah 7 (DK3 L7) contains a policy to increase enforcement efforts to prevent and halt unlicensed agriculture and development on hill land and to limit agriculture in highland areas exceeding 100ft to crops that are in accordance with the Land Conservation Act 1960. B

[30] Dasar Khusus 3 Langkah 8 (DK3 L8) provides for an increase in monitoring of the safety level of existing hillside development. C

[31] Lastly, Dasar Khusus 3 Langkah 9 (DK3 L9) provides for a stricter implementation of the provisions of the TCPA, and the Street, Drainage and Building (Amendment) Act 1995 (incorrectly stated to be 1995 in DK3L9 of the Rancangan Struktur Negeri Pulau Pinang 2020). D

(C) *Special projects guidelines*

[32] The creation of the special projects guidelines came about in 2009, that is some two years after the structure plan had been *gazetted*. The structure plan had been prepared by the State Director in accordance with the TCPA. In his review of the structure plan the State Director discovered that there were problems with the structure plan involving the seeming conflict or overlap between the National Land Code, the structure plan and the Pelan Dasar and the absence of a definition of 'special projects'. Accordingly he determined that this required rectification in the structure plan. However, he was not prepared to undertake the requisite amendments vide the procedure set out in the TCPA as he felt it would 'take a lot of time'. E F

[33] Accordingly, on 21 and 26 May 2009 the State Director informed the State Planning Committee in the presence of representatives from the local authority that there was a need to modify the structure plan to 'overcome' the problems and issues that had arisen in relation to planning permission, more particularly on hill lands and hill slopes. This was done by the State Director of JPBD (the planning division) presenting a working paper varying or expanding the structure plan by introducing a definition for 'Special Projects', a term set out in DK3 L4 of the structure plan. G H

[34] The State Planning Committee reviewed and approved this working paper proposing guidelines for the definition of 'Special Projects'. This, it was contended, would facilitate the applications for development projects on hill lands and hill slopes. The local authority submits that the guidelines were required for purposes of expediency, in view of the numerous applications made for such developments on hill lands. The special projects guidelines were I

then put to use in determining applications for planning permission.

[35] The salient part of the special project guidelines setting out the exceptions provides as follows. Under Category 1 infrastructure projects for the Government for public use are specified as exceptions in sub-para (a). Sub-paragraph (b) sets out examples of what is meant by infrastructure projects for the Government, such as a cable car project; a hill rail project and such other infrastructural projects necessary for public use. Clearly the housing project of Sunway does not fall within Category 1.

[36] Category 3 deals with exceptions in relation to special projects involving soil works such as quarry works, rock extraction and agricultural activities on hill land which is not relevant here.

[37] It is Category 2 that is the subject matter of dispute in the instant appeal. Accordingly, Category 2 requires reproduction in Bahasa Malaysia in order to appreciate what the litigants and the courts below stipulate as comprising the crux of the appeal:

2. Kategori 2

(a) pembangunan perumahan terdahulu di mana permohonan tukar syarat tapak Kawasan berkenaan telah di luluskan di bawah perundangan Negeri bagi tujuan perumahan dan kelulusan tersebut telah disahkan sebelum kelulusan dan penerimapakaian RSNPP 2020;

(b) antaranya termasuk projek pembangunan yang pernah dapat kebenaran merancang atau;

(c) tapak yang di tunjukkan sebagai kawasan perumahan mengikut Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP (sehingga RT di wartakan).

A literal translation of the Category 2 exceptions to hill side development reads:

(a) previous (or prior) housing developments where applications for conversion of land use had been approved by the state authority for the purposes of housing and such approval was validated prior to the approval and implementation of the Structure Plan 2020;

(b) amongst these (or inter alia) are included development projects that had already obtained planning permission; or

(c) sites that are shown as housing areas in accordance with the *Pelan Dasar for MPPP* (until the RT is *gazetted*).

[38] The guidelines then go on to stipulate that, in order to expedite the consideration of these applications, all applications for planning permission

under Categories 1 and 2 do not require further reference to the State Planning Committee. As such the local authority did not refer the application to the State Planning Committee after it had decided that the proposed development fell under the 'Special Projects' exception of the structure plan.

[39] The parties are in dispute as to whether sub-para (c) of Category 2 is to be read disjunctively or whether it is to be read conjunctively with (a) and (b). This will be dealt with later on in the judgment. What is apparent however is that this is a matter of construction of a guideline (if valid) in the context of the TCPA, the structure plan and the National Land Code which requires mature consideration and does not encourage a grammarian approach in relation to punctuation in the English language.

(D) The application by Sunway

[40] On 23 March 2011, Sunway submitted an application to the local authority for planning permission to have the subject land utilised for the housing development project as described earlier.

[41] On 3 May 2011 the land office wrote to local authority vide its One Stop Centre, advising that Sunway could proceed with its proposed housing development project as it held a first-class title to the subject land.

[42] The local authority served the relevant neighbouring owners, including the appellants, notice of their right to object to Sunway's application for planning permission, pursuant to s 21(6) of the TCPA. This section provides that where a proposed development is located in an area in respect of which no local plan exists at the material time, then upon receipt of the application for planning permission, the local authority 'shall' by notice in writing served on the owners of neighbouring lands inform them of their right to object to the application and to state their grounds of objection within 21 days of the date of service of the notice. It is evident that the local authority did so because there was no local plan in existence in 2011, notwithstanding the fact that the structure plan had come into effect in June 2007.

[43] On 10 May 2011 the appellants and other neighbouring landowners objected to Sunway's application for planning permission for the housing development.

[44] On 7 June 2011, a meeting was convened by the local authority pursuant to s 21(7) of the TCPA in order to 'hear' the appellants and all persons who had lodged an objection and who sought a hearing. Several of the neighbouring landowners including the appellants raised the following objections:

A (a) the subject land was *gazetted* as hill land pursuant to Pelan Warta 413 (WKPP No 116 dated 12 April 1990. The landowners including the appellants asked whether the excision of the subject land had been approved given that it was protected land under the LCA;

B (b) 43% of the subject land has an elevation of more than 76 metres above sea level and the majority of the subject land is categorised as 'Hutan Darat' under the Structure Plan 2020, notwithstanding it being marked out for zoning under the 1996 Interim Zoning Plan or the *Pelan Dasar*;

C (c) the subject land is a 'sensitive area' under the Structure Plan 2020;

(d) the proposed development was likely to contravene the guidelines under the LCA as condominiums of 18 floors could be constructed;

(e) the development gave rise to a density of 7.41 which it was alleged was overly dense;

D (f) the proposed development was inconsistent with the 'Cleaner Greener Penang' objectives under the Penang Structure Plan 2020 where sustainable approaches had to be adopted; and

E (g) the existing area in the vicinity of the appellants had already been inundated by incidents of landslides.

[45] The appellants and other neighbouring landowners did not hear after this from the local authority with regard to the objections they had made in relation to the proposed development and why these objections failed.

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[46] However, the appellants found out subsequently that in September 2011 , Sunway was advised by the district and land office that the subject land was declared as 'hill land' under the LCA. It was necessary to have the subject land 'excised' as hill land from the LCA. The local authority submits that when the application for planning permission was submitted there was no endorsement on the issue document of title of the subject land that it was subject to the LCA.

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H **[47]** Between 15 December 2011 and 21 December 2011, the state authority in a meeting approved Sunway's application for excision of the subject land as 'hill land' subject to conditions.

[48] On 18 January 2012 the land office issued a letter to Sunway to comply
I with the conditions set out in its letter including a payment of a special premium to it of the sum of RM1m.

[49] It is not in dispute that the proposed development which involved a gated and guarded housing scheme was circulated to all the relevant internal

technical departments of the local authority and the relevant external agencies for their respective comments and requirements. The Jabatan Perancang Bandar dan Desa or the Planning Department for Town and Country Planning had no objections to the proposed development. The geotechnical report was also approved as was the Environmental Impact Assessment Report ('EIA report').

[50] On 21 February 2012 the local authority granted planning permission to Sunway. The appellants were not informed of this decision on this date.

[51] The local authority had relied on the special projects guidelines to approve Sunway's application. It interpreted sub-para (c) of Category 2 disjunctively and as a stand-alone condition. In effect the local authority deemed that there was no requirement for the proposed development to have its rights vested prior to the implementation of the Structure Plan 2020 in June 2007 and, consequently, that it was sufficient for the proposed development to merely satisfy the condition that it was located within the areas for housing development under the Interim Zoning Plan or *Pelan Dasar*. The local authority submits that this was pursuant to a directive by the State Planning Committee in 1996 which directed for the *Pelan Dasar* to be applied. Consequently the local authority found that the proposed development fell within Category 2 of the special project guidelines, and so fell within the 'Special Projects' exception of the structure plan.

[52] Subsequently on 26 March 2012, the local authority informed the appellants and the neighbouring landowners that planning permission had been granted and advised them of their right to appeal against the decision to grant approval for the development to the appeal board. No reasons were given by the local authority for the decision, nor why the objections had been found to be without basis or merit.

[53] One of the conditions set out by the state authority in approving the application for excision was for Sunway to pay a premium in the sum of RM1m in order to enable the excision of the subject land. The sum was duly paid in April 2012.

[54] The revocation of the subject land as 'hill land' under the LCA was *gazetted* on 12 June 2012, which was around four months after the state authority had granted planning permission in February 2012.

[55] An appeal was lodged with the appeal board as explained at the outset, culminating in the present appeals.

V. GENERAL PRINCIPLES OF JUDICIAL REVIEW

[56] In setting out the general principles of judicial review, reference is often made to this court's decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 which essentially adopted the grounds of judicial review set out in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('CCSU'). In *CCSU* Lord Diplock had set out three main grounds of review, that is illegality, irrationality, and procedural impropriety, with the possibility of proportionality being established as a fourth ground. These classic grounds of judicial review are well-established in our law, though we wish to state a few matters with respect to the ground of 'irrationality'.

[57] It is to be recalled that in *CCSU*, 'irrationality' was defined restrictively, namely with reference to 'Wednesbury unreasonableness'. The definition relied upon in *CCSU* was as follows:

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...

[58] The precondition that the impugned decisions is 'outrageous' implies a very low level of judicial scrutiny. A more flexible approach is to be preferred in relation to this ground of review. In exercising a discretionary power, the local authority only has power to take into account lawful considerations, such as those specified in statute as well as other relevant considerations not specified in statute. This would, of course, need to be determined by the court in the circumstances of each case.

[59] A modern restatement of the *Wednesbury* test can be simply put: was the decision 'within the range of responses which a reasonable decision-maker might have made in the circumstances'? (*Gokool v Permanent Secretary for the Ministry of Health and Quality of Life* [2008] UKPC 54 at [18]). This head of review concerns whether the exercise of power was justified or improper, such as a material defect in the decision- maker's reasoning process tainting the final decision. It is worth citing *De Smith's Judicial Review* on this point:

> ... the question of what is a relevant or material consideration is a question of law, whereas the question of what weight to be given to it is a matter for the decision-maker. However, where undue weight is given to any particular consideration, this may result in the decision being held to be unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration ... (*De Smith's Judicial Review*, (8th Ed) 2018, para 11-029))

[60] To conclude this section, it is trite to state that all errors of law by administrative bodies are subject to judicial review. The constitutional relationship between courts and the executive was succinctly put by Nolan LJ in *M v Home Office* [1992] QB 270:

> ... the courts will respect all acts of the executive within its lawful province, and ... the executive will respect all decisions of the courts as to what its lawful province is.

[61] Questions of law are solely within the lawful province of courts, and so questions of law that define and demarcate a decision-making process are not to be determined by administrative bodies. Every legal power must have legal limits, and it is for the courts to determine whether power was exercised within the limits provided in law. In the present appeal the crux of the case relates to whether the decision maker namely the local authority went outside the four corners of their prescribed authority under s 22 of the TPCA.

[62] With that said, we now turn to the scope of issues in the present appeals.

VII. SUMMARY OF ISSUES

[63] The issues for consideration in law can be summarised as follows:

(a) whether the special projects guidelines were valid and consistent with the statutory provisions of the TCPA;

(b) if the special projects guidelines are valid, what is its relationship to the structure plan and what interpretation ought to be accorded to these guidelines;

(c) whether utilisation of the *Pelan Dasar* or the 1996 Interim Zoning Plan under the repealed legislation, is valid and lawful under the provisions of the TCPA;

(d) what is meant by the right to be 'heard' in law under s 21(7) of the TCPA;

(e) whether there was compliance with the State Planning Committee's duty to obtain advice from the National Physical Planning Council ('NPPC') under s 22(2)(a) of the TCPA; and

(f) whether the planning permission, having been granted prior to the *gazetting* of the revocation of the subject land, had contravened or breached the provisions of the TCPA and the LCA.

These issues will be dealt with in turn, following a brief appraisal of the TCPA.

VII. SCOPE OF ISSUES IN THE PRESENT APPEAL

[64] Learned counsel for Sunway argued that the scope of the present appeal is strictly confined to two issues:

(a) construction issue: what is the proper interpretation of the special projects guidelines, and whether the proposed project fell within the definition of 'projek istimewa' ie, special projects; and

(b) delegation issue: Whether there was any delegation of power by the State Planning Committee to the local authority to determine which development projects fall under special projects.

[65] Following from the above, it was argued that the court was precluded from considering the validity of the directions given by State Planning Committee, such as the status and applicability of the guidelines, and the directive to rely on *Pelan Dasar*, given the absence of a local plan. It was also argued that we were precluded from considering the apparent failure of the State Planning Committee to consult the NPPC. The reasons for excluding these issues were as follows. Firstly, they were not raised by parties earlier or they were not dealt with in the courts below. Secondly, that the appeal before the Appeals Board was confined to the planning decision by the local authority, rather than a decision by the State Planning Committee. If the decisions of the State Planning Committee are to be challenged, such challenge should have been brought in a separate judicial review. And lastly, the State Planning Committee was not a party in the present appeal.

[66] It is worth reiterating that the adversarial system does not condone contraventions of express provisions of the law. Courts do not condone contraventions of the law, be it under the TCPA or any other law. The court cannot ignore issues regarding the validity of administrative acts, particularly where an administrative body has acted ultra vires. The fact that this issue was not raised by the parties, whether deliberately or otherwise, does not preclude this court, upon becoming appraised of the issue whether from its own research or it having been pointed out by the parties, to raise and rule on the same, at any stage of the proceedings. These matters were raised during the submissions by the court, according the parties opportunity to respond to the same. The respondents took the position that the court was precluded from considering these issues entirely in determining the appeal.

[67] It was argued that the status or applicability of the *Pelan Dasar* was not raised in the first respondent's statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012, and no issue was taken with this matter in the courts below. The Court of Appeal case of *DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor* [2019] 3 MLJ 671; [2019] 3 CLJ 593 ('DKLS

Sunshine') was thereupon raised for the rule that the judicial review statement serves as pleadings and the court ought not to look beyond issues raised therein. *DKLS Sunshine* concerned a party who pleaded for prayers in their ex parte application which went beyond the scope of their pleaded case in their statement, and the High Court had dismissed the application for that reason. The Court of Appeal upheld this decision.

[68] With respect, this case is irrelevant to the issue at hand. *DKLS Sunshine* is not authority for the argument that the court is precluded from considering instances of illegality that were not raised by parties or in the courts below or, alternatively put, to condone contraventions of the law once the court is appraised of such. It is well within the confines of the present appeal for this court to consider contraventions of the law that were not previously raised by parties or addressed by the courts below. If the courts below embarked on reasoning that erred in law, or if the local authority's decision was tainted with illegality, it is within the province of this court to address that error. In the interests of ensuring justice in each case, the court has the power and hence discretion to consider issues which were previously not raised but which are relevant to deciding the matter before the court.

[69] It is worth citing a passage from Edgar Joseph FCJ in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471, a case which was subsequently cited with approval by the decision of this court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1; [2021] 2 MLRA 190:

> We would go further and say that notwithstanding the *Sababumi* case, it would be wrong to assume that the last word has been spoken regarding the position of even an appellant who seeks to argue in this court — a court of last resort — a ground which falls outside the scope of the issues regarding which leave to appeal has been granted.
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> Looking at the Rules, we note that sub-r 4 of r 47 shows that the appellant is 'confined to matters, issues or questions in respect of which leave to appeal has been granted', and sub-r 1 of r 57 emphasises the same point by providing that 'Subject to Rule 47 (4) ... the appellant shall prepare a memorandum of appeal setting forth the grounds of objection to the decision appealed against and specifying the points of law or fact which are alleged to have been wrongly decided ...', but sub-r 2 of r 57 makes the important concession to the appellant by providing that 'the appellant shall not at the hearing without the leave of the court put forward any other ground of objection ...'
>
> *Clearly, therefore, having regard to these provisions, the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice* ... (Emphasis added.)

[70] The court's power and hence discretion to consider all issues, relating to apparent contraventions of the TCPA, whether raised or not, is of particular significance in matters such as the present. The law relating to the grant or rejection of planning approval has consequences on larger issues of sustainable development within the country as well as the preservation and improvement of the environment. That these issues are of pivotal importance is evident from the TCPA itself, where the National Physical Planning Committee takes it upon itself to consider hill land development not only in the federal territories but throughout the country.

[71] It will be recalled that the core of these appeals turned on the construction or interpretation to be accorded to one portion of the special projects guidelines, namely that part relating to the interpretation of Category 2 of the 'special projects' exception.

[72] However, the validity of the directives given by the State Planning Committee in the instant case such as the special projects guidelines was simply not considered in the courts below. The High Court in dealing with this challenge to the validity of these guidelines held that the legality or otherwise of the guidelines does not affect or is not the decision of the local authority that is amenable to appeal before the first respondent following the Federal Court case of *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581; [2007] 5 CLJ 673 ('Sri Bangunan'). Therefore, it was equally not amenable to judicial review either.

[73] It is instructive to consider this court's decision in *Sri Bangunan*. In that case, the subject of judicial review was the local authority's decision in issuing a direction to the developer, the appellant, to preserve the existing building at the site and to erect its proposed development within the vicinity of that building. The issue before the court in *Sri Bangunan* was whether the direction given by the local authority under s 21(3) of the TCPA was a 'decision' which is appealable under s 23 of the TCPA. The Federal Court found that such direction given by the local authority was not an appealable decision under s 23 of the TCPA.

[74] It is clear to us that, upon setting out the facts and issue in *Sri Bangunan*, this case is irrelevant to the appeal before us. Unlike in *Sri Bangunan*, the subject matter of the judicial review here was a decision by the local authority that was appealable under s 23 of the TCPA, that being the decision to grant planning approval to the first respondent . The question before us is whether, in deciding whether the local authority had exercised its powers consistent with the TCPA, the court is only permitted to look at that decision in isolation or whether the court is permitted to consider the entirety of the approval process leading to the final decision of approval. In the instant

appeal, the entirety of the approval process brings our attention to the directions given by the State Planning Committee which is the starting point and was relied upon by the local authority in reaching its decision to approve the first respondent's application.

[75] The net consequence of looking at the local authority's decision *in vacuo*, as we were urged to do by the respondents, is that the issuance of guidelines at the behest of any body which is tasked with supervising the local authority, or from whom the local authority takes directions, such as the State Planning Committee, is effectively immunised from the application of the TCPA. A contravention of the TCPA then becomes immune from rectification or any other consequences that ensue.

[76] That cannot be a correct interpretation of the law in this context. In a judicial review application of this nature, what is before the court is the decision of the local authority to approve or reject planning permission. It necessarily follows that in arriving at a decision to approve or reject planning permission, the local authority is tasked with adhering to the several provisions of the TCPA, and any other relevant law or regulations. So, where there is a failure to adhere to the law, or where a decision has been taken on the direction of a related supervisory body which in itself has no authority to issue such a directive, it follows that that particular stage or step in the planning approval process is flawed. That flaw or error or act or omission without legal basis then taints the planning approval process, and consequently the final decision. For that reason, it is within this court's jurisdiction in these appeals to consider the legality of the directives issued by the State Planning Committee, as they comprise a part of the process of granting approval for the development of the subject land.

[77] Further, the first and second respondents appear to have conceded that the validity of directions given by the State Planning Committee are, at least to some extent, within the scope of the present appeal. This much is apparent from the delegation issue being an agreed issue between the parties. It is an issue which in essence concerns a direction given by the State Planning Committee. The delegation issue further demonstrates that the role and directions of the State Planning Committee are linked and indeed affect the validity of the local authority's decision to approve the application.

[78] In the course of submissions relating to the *Pelan Dasar*, the stance taken by the local authority, as submitted by its learned counsel, was that the use of the *Pelan Dasar* was valid and perfectly in order, as it was used pursuant to a directive issued by the State Planning Committee, for the purposes of granting planning permission. It was put forward to us by learned counsel for the first respondents that it is not for the local authority to question the validity

of directions given by the State Planning Committee (encl 93, p 10, para 20). This, again, cannot be the correct interpretation of the law, because that would tantamount to a fetter on its discretion as statutorily provided for in s 22. The local authority should not therefore blindly follow any and all directions by the State Planning Committee, without ascertaining whether there is compliance with the TCPA. We will address this further in para of this judgment.

[79] Furthermore, it was submitted that the issue of s 22(2A)(c) of the TCPA, which relates to the State Planning Committee's duty to consult the NPPC, could not be touched upon, or dealt with in these appeals, because the State Planning Committee was not a party to the action. It was also argued that this issue raises a factual question rather than a question of law, and that no evidence was produced as to whether the NPPC was consulted.

[80] On the latter point, there is no further evidence required for this court to assess whether s 22(2A)(c) of the TCPA was complied with. It is evident from the facts that the State Planning Committee had deliberately excluded itself from the planning approval process, vide its direction to the local authority that no further reference to the committee was needed where the local authority decided that an application fell under 'special projects'. This led to an approval process that excluded the committee, and, in effect, excluded the role of the NPPC. If indeed the local authority had taken on the responsibilities of the committee, they would have had the onus of showing that they met the requirement to consult the NPPC pursuant to s 22(2A)(c). It is therefore not open to the local authority, or any party in this case to argue that the relevant facts were not produced and so the court is precluded from considering the issue of compliance with s 22(2A)(c).

[81] In deliberating on Sunway's submission that the State Planning Committee is not a party to these appeals and therefore cannot be heard in its own defence, it needs to be borne in mind that the primary issue before this court in these appeals is whether the planning permission granted by the local authority to Sunway in respect of the proposed development is valid, as held by both the courts below. It is the decision of the local authority that the appellant seeks to quash, not the directive nor decision of the State Planning Committee.

[82] Learned counsel for Sunway relied on this court's decision in *Tenaga Nasional Bhd v Majlis Daerah Segamat* [2022] 2 MLJ 119; [2022] 2 CLJ 497. In that case, the appellant Tenaga Nasional Bhd brought an appeal by way of originating motion pursuant to s 145(1) of the Local Government Act 1976 ('the LGA') against the respondent local authority's assessment of improved values of the appellant's four main intake substations or *pencawang masuk utama* ('PMUs'). It was alleged that the assessment was inconsistent with the definition of 'improved value' in the LGA, as the assessment had taken into

account the value of the component structures installed in the PMUs. In the Federal Court, the appellant sought to also argue that the imposition of 'improved value' as decided by the state authority of Johor was ultra vires s 129 of the LGA. This court declined to determine this issue as, inter alia, the state authority who had made the policy to adopt the 'improved value' method was not a party to the appeal. In support of this, this court cited the general rule that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against a non-party, as well as the principle of natural justice.

[83] It is imperative to note the following. *Tenaga Nasional Bhd* concerned a statutory appeal under the LGA. This is unlike the present appeal, which concerns an application for judicial review. In these appeals it is, therefore, well within the jurisdiction of this court in assessing whether the local authority had exercised its powers ultra vires to consider the approval process as a whole, which ultimately led to the local authority's decision. This necessarily includes the legality or otherwise of the directions of the State Planning Committee. It affects the legality of the local authority's exercise of power. Simply put, if the directions by the committee contravened the TCPA, that renders those directions unlawful. The local authority would then be traversing beyond the scope of its lawful powers if it considered, or indeed relied upon an administrative direction that is unlawful and possibly a nullity. As such *Tenaga Nasional Bhd* is neither relevant nor applicable to the instant appeal.

[84] In determining whether or not the planning approval is valid, it is therefore necessary for the court to examine, consider and determine whether the provisions of the TCPA were followed by the local authority, in substance. Where there is a reference to the state authority, the National Planning Council or the State Planning Authority in the TCPA, which reference contributes towards, or underlies the decision-making process of the local authority under s 22, it is not necessary for all these entities to be made parties separately. That would lead to confusion and a multiplicity of representations, the culmination of which is contained in the approval or rejection of the planning approval.

[85] The directives issued by these authorities purportedly pursuant to the TCPA set out the basis upon which the local authority makes its decision. It is trite that any such directives and/or guidelines must conform to the TCPA. Ultimately, there is a culmination of these various duties and functions in the decision-making function of the local authority. Therefore, when that decision to grant or reject approval is made, it is open to the courts to scrutinise and ensure that the decision was in accordance with the statutory provisions of the TCPA. The provisions ensure that the object and purpose of the statute are detailed and specific. A deviation from the statute by for example, the issuance of directives or guidelines without any empowering statutory provision for

such deviation, can come under question and scrutiny, be it as a consequence of a preceding directive from the State Planning Authority or the State Director.

[86] It is therefore, with the greatest respect, untenable to suggest that a contravention of the TCPA on the part of the local authority in arriving at a decision ought to be ignored simply because it is premised on a directive from another body within the planning procedure statute, but was issued without statutory basis. It is equally incorrect to suggest that such a lacuna must be ignored because the entity issuing the directive is not a party to the proceedings and must be heard. On the contrary, if an infringement is prima facie made out by the challenging party, it is incumbent upon the local authority whose decision is under challenge and who is accorded a full opportunity to be heard to establish that the entire process culminating in its final decision was validly undertaken on the basis of the express provisions of the TCPA. That is the case here in relation to the use of the *Pelan Dasar* in the absence of a local plan.

[87] Any such explanation from the local authority relating to the grant or rejection of approval will necessarily include the validity of directives and guidelines issued by other third parties involved intimately in the crafting of procedures for the granting of approval. It goes without saying that any such procedure or guideline must comply with the provisions of the TCPA. Otherwise, it would be open to the planning authorities to simply ignore various provisions of the TCPA and for the local authority to maintain that its decision is unimpeachable, as any contraventions are attributable to higher authorities such as the State Planning Committee or the state authority.

[88] This would leave any party seeking to challenge the decision of the local authority in an invidious position, as they would be unable to point to contraventions of the TCPA as vitiating factors in relation to the planning approval. Allowing such a legal argument would amount to a condonation of a failure to comply with the TCPA. It would be permissible for parties to evade or circumvent primary aspects of the Act with no redress. That is a legally irrational conclusion and would potentially render the provisions of the TCPA nugatory.

[89] Therefore, contrary to the submissions by learned counsel for the local authority and Sunway, we are constrained to consider whether the directives issued by the State Planning Committee were valid.

(VIII) TOWN AND COUNTRY PLANNING ACT 1976

(A) Brief history of town and country planning legislation

[90] The was promulgated for the proper control and regulation of town and country planning in Peninsular Malaysia and purposes connected and ancillary to such regulation pursuant to cl (1) of art 74, cl (4) of art 76 and cl (2) of art 80 of the Federal Constitution. It is federal legislation made by the Federal Government pursuant to powers conferred in the Concurrent List.

[91] The 20th century saw several enactments implemented to control the development and expansion of towns within the jurisdiction. The first town planning law in Malaysia was enacted in 1923, the Town Planning Enactment 1923, which applied to the Federated Malay States. Even then this comprehensive enactment introduced the concept of public interest as justification for 'encroaching' on the development rights of landowners (see *Malaysian Town and Country Planning — Law and Procedure* by Ainul Jaria Binti Maidin published by The Malaysian Current Law Journal Sdn Bhd, 2012 at p 10).

[92] However, the planning powers granted under this enactment were drastically reduced in the Town Planning Enactment 1927 and planning powers were absorbed into local government legislation originally entitled the Sanitary Boards Enactment (FMS Cap 137) and subsequently renamed the Town Boards Enactment (Cap 137) as the scope of the enactment was widened. This enactment provided a comprehensive blueprint for town planning which took into account the interests of landowners too.

[93] Post-Independence, the town and country planning system in Peninsular Malaysia was provided by the TCPA, modelled on the British system of development. With the introduction of this legislation, the town and country planning provisions of the Town Boards Enactment Cap 137 were repealed. This means that all the development plans under Cap 137 also stood repealed.

(B) Object and purpose

[94] The object and purpose of the TCPA is to control development in relation to the use of land. Simply put, the scheme and purpose of the TCPA is to limit the exercise of landowners' property rights. It provides for the power to require landowners and developers to comply with plans and policies of the local planning authority in relation to development. Development is defined very broadly under the Act in that it includes almost all activity carried out on, under or over land including change of use (see encl 93, p 10, para 20).

[95] What, then, are the fundamental elements of the TCPA? In other words what was the legislative intent in not just the ultimate object of the statute but in the principles and mechanisms through which this object is to be achieved?

The fundamental aspects of the TCPA can be distilled from the statute itself, not by merely reading discrete provisions on their own but by considering the statute as a whole and hence giving full meaning and effect to what was intended by the collective will of Parliament.

[96] In the context of development, regulation is achieved by ensuring that development is in accordance with the development plans for that particular State or area. The development plan takes the form of the structural plan and ensuing from the structural plan, the local plan. The local plan details how the structural plan is to be implemented in each area and zone.

[97] Such regulation is evident from the statutory provisions under the TCPA, in particular in s 22 which prohibits the grant of planning permission, if a proposed development is not in conformity with the development plan. This is further affirmed by s 20 which prohibits any development that is contrary to planning permission granted.

[98] Another fundamental aspect of the TCPA is the inclusion of the element of public participation in the land planning process. This element is an integral part of the democratic process which enables the public to require accountability in relation to development in and around where they live. This aspect is statutorily provided for in, inter alia, ss 9, 10, 12, 12A and 13 which requires public participation in the drawing up of both structur e plans and local plans.

[99] In relation to local plans, public participation is required under ss 12A and 13 by way of publicity of the preparation of the draft, publicity of the draft itself and allowing for representations or objections to be made. The local planning authority has a duty under s 15 to consider the objections or representations, but there is no requirement to hold a local inquiry or hearing. This is at the discretion of the local authority provided under s 14(1).

[100] In relation to structure plans, public participation takes the form of the following. Firstly, it is ensured during the preparation and approval process of the structure plan. Public participation is ensured by way of publicity, that is the draft structure plan must be exhibited to the public to enable them to comment, make suggestions and objections. The policies and strategies are made accessible to the public with the provision of charts, maps, models and video representations. The public is allowed to object to policies and strategies and to make alternative recommendations. These representations or objections must be considered by the committee pursuant to s 10(3)(a), and objections must be heard by a sub-committee appointed by the committee under s 10(3)(b). 'Consideration' as provided for in the Act would rationally and necessarily require actual deliberation and a determination or conclusion as to

whether the objections are valid or unmeritorious. A second opportunity to participate arises during the planning permission approval process where the proposed development is located in an area in respect of which no local plan exists. Where there is no local plan, the local planning authority must give notice pursuant to s 21(6) to the owners of the neighbouring lands of their right to object to the proposed development. Pursuant to s 22(2)(c) these objections must be considered by the local planning authority when it decides whether or not to grant the approval. These provisions will be considered in detail in Parts XI(B) and XIII below.

[101] In short, the final structure plan is premised on the blueprint guide for development with full public participation in relation to use of land, zoning, environmental constraints etc. To that end, the TCPA statutorily ensures that the democratic process of public participation in decision-making is preserved and protected in the structure plan and the local plan. Ultimately, planning regulation exists to control the development of land in the public interest.

[102] There are two additional linchpins of the TCPA we wish to highlight, namely the integration between Federal and State governments on matters related to town and country planning, and the promotion of environmental protection. These two aspects are made apparent by virtue of the Town and Country Planning (Amendment) Act 2001 ('Amendment Act'), and, as they are interlinked, these aspects will be considered in tandem.

[103] In the Federal Constitution town and country planning is an item under the Concurrent List. In this regard the Federal Constitution envisions a spirit of mutual responsibility and an integrated relationship between Federal and State Governments on matters related to town and country planning. This spirit was evident in the enactment of the Amendment Act. The Amendment Act introduces new provisions which substantially directed the TCPA towards the aims of ensuring integration of Federal and State Government policies, and 'ensuring uniformity of law and policy' in Peninsular Malaysia. This is made clear in the preamble to the TCPA as introduced by the Amendment Act, the preamble reads as follows:

> WHEREAS it is expedient for the purpose of ensuring uniformity of law and policy to make a law for the proper control and regulation of town and country planning in Peninsular Malaysia:
>
> AND WHEREAS it is also expedient that provisions be made to *confer executive authority on the Federation over certain matters in relation to the control and regulation of town and country planning* (Emphasis added.):

[104] The Amendment Act confers executive authority to the Federal Government vide the creation of the NPPC under the new s 2A of the TCPA, and other provisions introduced by the Amendment Act. It's clear that, with

this amendment, the NPPC is placed at the highest level of the planning administration hierarchy as demonstrated not only by the placement of s 2A within Part II of the TCPA (eg it appears first and prior to both the Director General of Town and Country Planning under s 2B, and the State Planning Committee under s 4), but also by the members of the NPPC. Pursuant to s 2A(1) of the TCPA the NPPC is chaired by the Prime Minister and comprises as its members the Deputy Prime Minister, the Minister responsible for town and country planning as well as housing and local government, the Minister of Finance, the Minister responsible for land, the Menteri Besar or Chief Minister of every State, the Minister responsible of the Federal Territory and a maximum of seven other members selected by the chairman. In summary, it consists of representatives from both Federal and State governments.

[105] The functions of the NPPC include, inter alia, the promotion within the entire country and the framework of national policy, town and country planning as an effective and efficient instrument for the improvement of the physical environment and towards achievement of sustainable development in the country. In the context of the status and functions of the NPPC, the Amendment Act establishes its role throughout the planning process by introducing new provisions or amending existing provisions of the TCPA. We set these out in brief below.

[106] Firstly, there is a general duty on both the Federal and State Governments to consult the State Planning Committee on any development activity it proposes to carry out within a State pursuant to s 20(a) of the TCPA. Secondly, in relation to the preparation of structure plans, the NPPC's role is inserted at the point of the institution of surveys under s 7, the preparation or drafting of the draft structure plan under s 8, and the decision-making process as to the approval or rejection of the draft structure plan by the State Planning Committee under s 10. For example, the Amendment Act amended s 8(3)(c) to provide the NPPC with the power to prescribe matters which ought to be contained in the draft structure plan. Section 8(3)(a) was also amended to stipulate that the draft will include measures for facilitating sustainable development. These amendments are evidently in line with the key importance in the TCPA of promoting integration between Federal and State Governments as to town and country planning as well as environmental protection.

[107] It is worth highlighting that s 10 was also amended to include the role of the NPPC in the decision-making process as to the approval or rejection of a draft structure plan. Section 10(4) provides that, in its consideration of the draft structure plan, the State Planning Committee has a duty to consult with the NPPC for its direction and advice.

[108] Even after a draft structure plan has been approved, the NPPC has role within the procedure to alter an existing structure plan. Section 11B(2) of the TCPA provides that the NPPC has the power to direct the State Director to have regard for certain matters in its formulation of proposals for such alterations.

[109] In the treatment of planning permissions under s 22 of the TCPA, amendments were made to include the NPPC in this process, in particular the inclusion of the NPPC's advisory function. Section 22(2A) was inserted vide the Amendment Act, and the provision reads as follows:

> (2A) Where an application submitted under this section involves —
>
> (a) the development of a new township for a population exceeding ten thousand, or covering an area of more than one hundred hectares, or both;
>
> (b) a development for the construction of any major infrastructure or utility; or
>
> (c) a development affecting hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan,
>
> the *Committee shall request from the Council its advice on the application submitted* (Emphasis added.)

[110] For the purposes of the present appeal, s 22(2A)(c) is of particular relevance. In its consideration of an application for planning permission, the State Planning Committee is under a duty to request for advice from the NPPC where the application involves 'development affecting hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan'. This amendment is highly significant in ensuring two fundamental aspects of the TCPA, that of integration between Federal and State and environmental protection. It is to be recalled, again, that one of the functions of the NPPC is to promote environmental protection and sustainable development.

[111] The TCPA's focus on integration between Federal and State, environmental protection, and sustainable development is also clear from the explanatory statement to the bill and Hansard debates. Although statutory interpretation is exclusively within the province of the judiciary, Hansard and Parliamentary speeches may serve as an interpretive aid (*Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd* [2021] 6 MLJ 348; [2021] 8 CLJ 409 at para [53]). With respect to the inclusion of s 22(2A), development affecting hill tops or hill slopes are no longer merely an issue of local or state governance. It is also a federal level and national issue. The inclusion of the role of the Federal Government in town and country planning would promote coordination between the local authority, State-level authorities, and the Federal Government, thus ensuring development takes place in a well-balanced manner and accords with the sharing of responsibilities

as well as the principle that the public interest precedes private interest in the use and development of land. This much was made evident by the Minister in the Hansard debates that took place on 30 July 2001 and 31 July 2001 (this argument was raised in the appellant's submissions (encl 57), pp 140–143).

[112] It is worth summarising in brief the prominence of environmental protection in the TCPA following the passing of the Amendment Act. The fact that such amendments were introduced throughout the TCPA demonstrates the legislative intent in amending the TCPA so that the statute would play a more prominent and effective role in environmental protection. Firstly, the very creation of the NPPC and its functions including environmental protection and sustainable development. Secondly, and as highlighted earlier, the insertion of the NPPC's role throughout the planning process and, given the NPPC's functions, ensuring that environmental considerations are taken into account throughout.

[113] In the context of the above provisions, and the significant amendments made to the TCPA vide the creation of the NPPC, it is clear that the TCPA is aimed towards achieving integration between Federal and State as well as environmental protection. The NPPC can be seen as a buckle or link between these two objectives; as a body sitting at the top of the planning administration hierarchy, it is tasked with the responsibility of ensuring development throughout Peninsular Malaysia takes into account environmental protection and sustainable development.

[114] It is therefore of primary importance in interpreting any of the provisions of the TCPA that regard is had to the object and purpose of legislation as statutorily required under s 17A of the Interpretation Acts 1948 and 1967 (Act 388) (see the Federal Court decision in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590). It is not tenable to excise a section or subsection within the TCPA and seek to interpret the same within the confines of that section. Less so is it acceptable to construe various provisions within the TCPA in a grammarian fashion with greater emphasis on the placement of punctuation marks, rather than with a view to comprehending the relevant provision within the context of the TCPA as a whole.

IX. THE PENANG STRUCTURE PLAN

(A) Relevant provisions in the TCPA

[115] The crux of these appeals is whether the approval of planning permission for the proposed development was consistent with TCPA and other relevant laws. In understanding whether or not the structure plan has statutory

force under the TCPA, it is necessary to comprehend the relevant provisions in the TCPA pertaining to the structure plan.

[116] Part III of the TCPA entitled 'Development Plans' deals with the development plans for a State, which refers to both the structural plan and local plan. Part III deals with the process of how these plans are planned, developed and finally implemented. It is relevant that the element of public participation is an integral component of both plans.

[117] Section 2 defines the structural plan as well as a local plan as follows:

> A 'structure plan' is defined as: '... in relation to an area, means the structure plan for the area, and any alteration of the plan, having effect in the area by virtue of subsection 10(6)0, and in relation to any land or building means the structure plan, as so defined, for the area in which the land or building is situated; and 'draft structure plan' shall be construed as the context requires;
>
> A 'local plan' is defined as: '... in relation to an area, means the local plan for the area and any alteration of the plan for the t ime being having effect in the area by virtue of subsection 15(1); and in relation to any land or building means the local plan, as so defined for the area in which the land or building is situated; and 'draft local plan' shall be construed as the context requires; ...';

[118] Sections 9 to 11 of the TCPA set out the procedure for the preparation and approval of a draft structural plan, as well as the procedure for reviewing or altering a structure plan.

[119] Section 9 sets out the requirement for publicity in connection with the preparation of the draft structure plans. It places the responsibility on the State Director to take such steps as may be necessary to ensure that publicity is accorded in the State in relation to the surveys undertaken and to ensure that persons who might be expected be accorded an opportunity of making representations to the proposals in the structure plan are afforded such an opportunity and that those representations are given due consideration.

[120] Even the details of how this is accomplished are set out in s 9(2). This brings to the fore the importance of public participation in the development of land in the State. It is statutorily provided for to signify the importance of the people in the State being accorded a full opportunity to participate in the development of the same.

[121] Section 10 outlines the steps the State Planning Committee is to take when deciding whether to approve, reject or approve in part the draft structure plan. In the course of arriving at a decision, sub-s 3 stipulates that the committee is bound to:

(a) consider any objections to the plan;

(b) afford to the objectors an opportunity to appear before them personally either through a sub-committee or; and

(c) if a local inquiry or other hearing is held afford an opportunity to the State Director and other persons nominated by the committee.

[122] Again, the significance of these statutory provisions emphasise the importance given to public participation in the form of representations in arriving at any development plan. This is reflective of the democratic process in play in relation to the development of the area. Every citizen enjoys a right to be heard.

[123] Section 10(7) provides for the structure plan to come into effect by the fact of assent to it being published in the State *Gazette* and the newspapers. The places where the structure plan may be inspected are also expressly specified.

[124] A structure plan is subject to review every five years after it comes into effect vide s 11(1). However, after a structure plan has come into effect, a review or alterations to the same can be made. This is done vide the State Director submitting the proposed alterations to the State Committee for review. If indeed that an alteration is to be made then once again the alteration must be published in the newspapers and made available for review and inspection. There is provision for objections to be made within a month. This is in s 11B. There is further provision for a committee to hear any objections, consider the same prior to deciding whether to admit, reject or allow in part the proposed alteration, in ss 11B(4) to (7). It is therefore evident that public participation in the content of the structure plan is essential by provision of statute. This is in line with the purpose and object of the TCPA.

(B) Legal status and legal effects

[125] It is not in dispute between the parties that the structure plan enjoys statutory force, in that it has legal status and legal effects. The structure plan must be complied with, and where the approval process fails to comply with the structure plan the process is tainted and in contravention of the TCPA. That is, with respect, the correct position as laid down some considerable time ago in the inspired and timeless case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbeguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 ('Sungai Gelugor') where Edgar Joseph FCJ held:

> The question for decision regarding this part of the case, therefore, is: in considering an application for planning permission for development, what is the status and relevance of the Development Plan? It is not difficult to cite an authology of authorities on this question. Our choice is as follows.

> By s 22(2) of the Act, it is provided that in dealing with an application for planning permission, the local planning authority 'shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular, inter alia, the provisions of the Development Plan'. These statutory provisions are equivalent to s 70(2) of the UK Town and Country Planning Act. In this context, the cases of *Kissell v Secretary* (1993) TLR, 22 July at p 32, *Etherridge v Secretary of State for the Environment* (1991) EGCS 28; *Good v Epping Forest DC* [1994] 2 All ER 156 and *R v Westminister City Council, ex p Monahan* [1989] 3 WLR 408 (the *Royal Opera House Covent Garden* case) are relevant and show that the *structure plan has legal status and cannot be disregarded*, as Counsel for the Society implied by his submission.
>
> It is also obvious that the statutory requirement in s 22(2) of the Act, 'to take into consideration' to the provisions of the Development Plan *does not mean that the local planning authority must slavishly comply with it*. It will suffice if it considers the Development Plan without incurring the obligation to follow it. (See, Lord Guest in *Simpson v Edinburgh Corp* [1960] SC 313; *Enfield London Borough Council v Secretary of State for the Environment* (1974) 233 EG 53). But, note the two situations — not material to the present case — where the planning authority would be debarred from granting planning permission (s 22(4) of the Act). (Emphasis added.)

[126] However, we are not entirely *ad idem* with Edgar Joseph FCJ's dicta where, although His Lordship accepted that the structure plan had statutory force, His Lordship went on to state that there was no necessity for 'slavish compliance' with the same.

[127] To comprehend our contention fully, it is noteworthy that His Lordship Edgar Joseph FCJ adopted the approach taken by the Scottish Outer House in *Simpson v Edinburgh Corporation* [1960] SC 313. Yet, a careful reading of the Scottish equivalent of the TCPA, the Town and Country Planning (Scotland) Act 1947, which was applicable in *Simpson*, demonstrates that there are material differences between the two statutes which warrant different treatment as to their effect. Under the Scottish legislation, and unlike the TCPA, there is no requirement for the statutory development plan to be gazetted. Section 9 of the Town and Country Planning (Scotland) Act 1947 only provides that the local authority 'shall publish in such manner as may be prescribed by regulations under this Act a notice stating that the plan has been approved, made, or amended'. It is also pertinent to note that there is no equivalent in the Scottish legislation to the TCPA's provision that planning permission shall not be granted where it contravenes the development plan. This is pursuant to s 22(4)(a) read together with s 20 of the TCPA. It is clear that under the TCPA, once a development plan is approved and in force it has the effect of invalidating planning permission where such permission was granted contrary to the plan. This is not the position under the Scottish legislation. For these reasons, His Lordship's dicta in *Sungai Gelugor* does not

accurately reflect the legal status and effect of the structure plan under the TCPA.

[128] In line with interpreting the TCPA holistically and in order to give effect to its object and purpose as intended by Parliament, the statutory force of development plans under the TCPA requires 'slavish compliance'. Such compliance with the development plans would advance the cornerstone of the TCPA of ensuring public participation which in practice means publication and transparency of the relevant policies upon which development is permitted and, so, allowing for members of the public to object and make representations to such policies. Issuing or relying on secret, unpublished guidelines to make decisions on granting or rejecting planning permission would be antithetical to the TCPA and its object.

[129] It is important to clarify the delineation between law and policy vis a vis the structure plan. Pursuant to s 8(3) of the TCPA, the structure plan is a written statement that formulates, inter alia, the policy and general proposals in respect of the development and use of land in a State. The formulation of these policies and proposals requires the exercise of judgment concerning planning considerations. However, once the draft structure plan has been *gazetted*, the structure plan and its provisions attain statutory force. Its statutory force stems from not merely its *gazettement*, but also its source and the requirement of compliance in the approval process. The source of the structure plan, or its starting point is a statutory provision requiring the State Director to prepare a draft structure plan. This is unlike normal policy documents, the drafting of which is within the discretion of the relevant public authority. Further, s 22(4) of the TCPA provides that where the approval of planning permission contravenes any provision of the development plan, this would have the effect of invalidating that approval. It is thus evident that the structure plan has legal status and legal effects under the TCPA, and that it is not a mere statement of policy that has no legally binding force.

[130] For reasons set out above we conclude that the decision of the High Court in the instant appeal is incorrect in simply dismissing the structure plan as being devoid of statutory force and amounting to a mere statement of policy. In so concluding His Lordship was guided by *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704 ('Abdul Rahman Abdullah Munir') where the same error of law was made. It is important to note that the latter case failed to give any consideration to *Sungai Gelugor* and its finding that the structure plan has legal status. To that extent *Abdul Rahman Abdullah Munir* was decided per incuriam and is not good law. As such the High Court erred in relying on *Abdul Rahman Abdullah Munir* to conclude that the structural plan has no statutory force and could simply be ignored. The Court of Appeal duplicated this error in following the judgment

of the High Court, again failing to consider *Sungai Gelugor*. As such both the courts below committed a serious error of law in failing to appreciate the true significance of the structure plan as has been explained fully above.

(C) Interpretation of the structure plan

[131] We refer to the provisions of the structure plan as set out in Part IV(B) above. The overarching objective of the structure plan's policies on hill land is to ensure that hill land continues to be conserved in order to maintain ecological balance in the State. This is an imperative aim, in light of how the high pressure of development is increasingly threatening hill land. The main ways to achieve this aim, as addressed in the structure plan, is to *gazette* hill land areas, enforce of planning guidelines, and control hill land.

[132] It is evident from the provisions in the structure plan, in particular DK3 L2 and L3, that there is a clear prohibition against the use of hill land as specified for any development including housing, hotel, resort, commercial and industry, even agricultural activity. This is consonant with the overarching objective of the structure plan. Exceptions to that prohibition must be interpreted purposively and restrictively so as not to depart from the structure plan and its objective of conserving hill land, preventing its further degradation, and maintaining ecological balance.

[133] Learned counsel for the first and second respondents have submitted that the structure plan is not a statute, and thus it should not be interpreted like one. In furthering this argument, learned counsel for the first respondent relied on the UK Supreme Court decision in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another; Cheshire East Borough Council v Secretary of State for Communities and Local Government and another* [2017] 4 All ER 938, where the court held that:

> [22] The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; 2012 SLT 739[2012] 2 P&CR 162. Lord Reid ... added, however, that such statements should not be construed as if they were statutory or contractual provisions:
>
> > Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another.
>
> ...
>
> [25] It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not

statutory texts, and must be read in that light.

[134] As we have set out in Part IX(B), the structure plan has statutory force as it has legal status as well as legal effects. This is unlike the position under the UK's Town and Country Planning Act 1990 (Act of 1990) and the Planning and Compulsory Purchase Act 2004 (Act of 2004) which were the subject legislations in *Hopkins Homes*. Under the UK Act of 1990, and unlike in our TCPA there is no requirement to *gazette* the relevant development plan. Further there is no equivalent to s 22(4) of our TCPA which requires that the local authority shall not grant planning permission where the proposed development would contravene any provision of a development plan. Instead provision is made in both the Act of 1990 and Act of 2004 that any determination made under the planning legislation must be made in accordance with the development plan, unless material considerations indicate otherwise.

[135] In light of these material differences, the approach to interpretation adopted in *Hopkins Homes* is not entirely applicable. The provisions of the structure plan must be read purposively, and the exception to the general prohibition against hill land or slope development is to be construed strictly in order to achieve a purposive and harmonious interpretation that advances both the object of the structure plan and the TCPA.

[136] This approach is consistent with the appeal board's interpretation of the 'special projects' exception:

> [14] The phrase 'special project', when purposively construed in the context of DK3 L4 and section 4.5.2 under the Penang Structure Plan 2020, must mean *a project that possesses features which can set it apart from other (usually commercial) projects; so that it becomes 'special' enough (vis a vis planning considerations) to warrant casting aside or modifying the overall intention of preserving hill lands, which intention forms the backbone of section 4.5.2 of the Penang Structure Plan 2020.* (Emphasis added.)

[137] However, the structure plan itself provided no definition of 'special projects' and so provided no scope as to the breadth of this exception. It was due to this lacuna in the structure plan that the State Planning Committee issued the special project guidelines which were purportedly issued vide its powers under s 4(5) of the TCPA. We will address this issue below.

X. INTERPRETATION OF S 4(5) OF THE TCPA

(A) Power to give directions not inconsistent with TCPA

[138] In the present appeal, the relevant directives by the State Planning Committee are as follows: the special project guidelines and the directive in

1996 stating that the *Pelan Dasar* must be used in its entirety until a local plan is *gazetted*.

[139] In determining whether these directives were intra vires, we are tasked with interpreting s 4(5) of the TCPA. Section 4(5) is of particular importance in the present case as it was relied upon by the first and second respondents in arguing that the said directives were issued consistently with the TCPA. The provision is set out below:

> (5) the committee may from time to time give to any local planning authority *directions not inconsistent with the provisions of this Act*, and the local planning authority shall give effect to such directions. (Emphasis added.)

[140] At the outset it is worth briefly setting out the general principles on the interpretation of statutory provisions. It is a cardinal rule of statutory interpretation that provisions must be read as a whole and that they must be read to give effect to legislative intent, including the object and purpose of the Act. This is further underscored by s 17A of the Interpretation Acts 1948 and 1967.

[141] As such s 4(5) of the TCPA must not be read *in vacuo*, as this would lead to an unnatural meaning and would fail to give effect to the true purport and meaning of this section as envisioned by Parliament. In line with the purposive interpretation of statutes and the aim of giving effect to legislative intent, provisions should be interpreted holistically and should not, as far as possible, be interpreted in a way that would contravene other provisions in the Act. The Act must be read holistically and its provisions read harmoniously. This was expressly provided in s 4(5) of the TCPA itself. For instance, a provision cannot be interpreted such that it would result in effectively negating the application of another provision. A provision cannot be used to fetter the legislative intent in enacting other provisions of the Act and the purport of the Act as a whole.

[142] It is apparent that s 4(5) of the TCPA grants the State Planning Committee with a power to issue directions to the local authority, and the provision clearly stipulates that such directions are to be consistent with the TCPA. It is trite law that when Parliament confers powers on a public body, such powers are to be exercised in a way that would promote the policy and object of the TCPA. The courts are entitled to intervene where an exercise of such power by the relevant authority frustrates the policy and object of statute: *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590, and *Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997.

[143] It will be recalled that, following suggestions put forward by the working committee on or around April 2009, the special projects guidelines

were issued by the State Planning Committee. For present purposes it is worth recalling two particular aspects to these guidelines: first, it provided a definition of 'special projects', a term used in the structure plan; and second it directed the local authority that where an application falls under 'special projects', there is no need for further reference to the State Planning Committee. We will first turn to the fact that the guidelines provided a definition for the purpose of filling a lacuna in the structure plan.

(B) Special projects guidelines vis a vis statutory provisions on alteration of structure plan

[144] The main reason for issuing the guidelines was to remedy apparent defects in the structure plan such as the absence of a definition of 'Special Projects'. The guidelines provided the scope of the limited exception to the general prohibition of development on hill land in the structure plan, including housing development. The substance of the structure plan in relation to developments on hill lands and hill slopes is expressly prohibited there, save and except for Dasar Khusus 3 Langkah 4. The rest of the provisions of the structure plan precluded development on hill slopes for the purposes of environmental sustainability and safety. Accordingly stringent requirements were put in place in the structure plan to regulate and control such hill developments. It will be further recalled that these were the guidelines relied upon by the local authority to grant planning approval to Sunway.

[145] It is within this context that the following issues arise in relation to the validity of the planning approval:

(a) whether the State Planning Committee, local authority or other entity was empowered under the TCPA to issue such guidelines on 'special projects' so as to define, expand, vary or alter such express provisions within the structure plan; and

(b) if indeed there has been non-compliance with the TCPA, are these 'special project guidelines' further defining 'Special Projects' valid or not?

[146] It is evident from the series of events described by the local authority itself that there was a deliberate dec ision made not to follow the requisite statutory procedure for altering a structure plan pursuant to ss 11, 11A and 11B of the TCPA. In particular, instead of using its power to trigger the alteration procedure under s 11(2), the State Planning Committee elected to issue guidelines purportedly pursuant to s 4(5) to define the term 'special projects' used in the structure plan. This was because it would take too long to comply with the statutory alteration procedure and the guidelines were required expeditiously to allow for the numerous planning applications which were piling up to be processed. It follows that these applications were required

because the local authority was not certain of what categories of developments could be approved under the exception provision of the structure plan in relation to hill lands and hill slopes. Therefore, the working committee took it upon itself to determine that issue and the State Planning Committee approved it.

[147] The purported effect of the special projects guidelines was to provide for substantive provisions which deviated from the structure plan, not to mention the National Physical Planning Commission's blueprint. The structure plan essentially prohibits development, including housing development, on hill lands save for public interest purposes and in other exceptional circumstances. Although the proper interpretation accorded to 'special projects' in the guidelines is in dispute, it is common ground that the guidelines sought to fill in a lacuna in the structure plan by providing a definition and specific conditions to be met for a proposed development to fall under the 'special projects' exception under the structure plan. The effect of the de facto amendment to the structure plan was to define the scope of the exception and hence enable or facilitate the development on hill lands and hill slopes at the discretion of the local authority, including residential or even mixed residential and commercial buildings. One of the categories of 'special projects' stated in the special projects guidelines meant that planning permission would follow as long as approval was granted by the several internal and a few external agencies within the state in relation to environment, and provided that the development fell within the area zoned under the 1996 *Pelan Dasar*. It was an expeditious manner of resolving the mounting planning applications. However, this 'expeditious' means of dealing with applications is not supported by the statutory provisions of the TCPA, and in effect falls foul of the same. Further the net effect of reading these guidelines so widely is that the fundamental purpose and underlying concern of the structure plan is effectively whittled down substantively. It is this departure from the stringent provisions of the structure plan and the TCPA that gives rise to concern.

[148] The High Court at para 48 of its judgment had concluded that the State Planning Committee may issue directives pursuant to s 22(2)(aa) of the TCPA to supplement the structure plan. The section reads as follows:

> (2) ... *In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular —*
>
> (a) The provisions of the development plan, if any;
>
> (aa) *the direction given by the committee, if any*;
>
> ... (Emphasis added.)

[149] The argument appears to be that apart from the structure plan, the

local authority is entitled to take into consideration 'the direction' of the State Planning Committee, which it is presumed includes these guidelines. The interpretation that the State Planning Committee may issue directives pursuant to s 22(2)(aa) is, with respect, incorrect. Section 4(5) is the source of the committee's power to issue directives whereas s 22(2) frames the local authority's discretion in deciding on planning applications, namely by providing an inexhaustive list of matters to be considered by the local authority when it is dealing with an application for planning permission.

[150] We will turn to the local authority's duty in Part XI of this judgment, but for now it suffices to note the following. Pursuant to s 22 read together with s 4(5), the local authority has a duty to consider the factors listed under s 22(2) including directions given by the State Planning Committee. However this cannot be understood to mean that it has a duty to consider directions which contravene the TCPA and which are thus unlawful. If the local authority has a duty to consider or comply with any and all directions by the State Planning Committee, whether they are intra vires or not, this would be the pinnacle of arbitrariness. Blind compliance with such directions would amount to the local authority fettering its own discretion, which would be irrational and unlawful.

[151] We refer to, and adopt our reasoning set out in Part VII in that the legality of the State Planning Committee's exercise of power under s 4(5) is linked with the legality of decisions of the local authority pursuant to s 22 of the TCPA. The exercise, or purported exercise of power of these two bodies cannot be viewed in isolation from each other.

[152] The power accorded to the State Planning Committee to issue directives under s 4(5) and relatedly the local authority's power to grant or reject planning permission under s 22 are equally required to be exercised in consonance with, and intra vires the TCPA. The State Planning Committee is not empowered to issue guidelines which expand, vary or alter the structure plan as this would completely circumvent and negate the application of the public participation-imbued alteration process provided under the TCPA. While the committee has the power to issue directions under s 4(5), this power must be read in line with its functions under s 4(4) and in line with the TCPA as a whole. There is simply no statutory provision allowing for a working committee albeit the State Planning Committee, local authority or other entity to draft 'guidelines' defining 'special projects' under Dasar Khusus Langkah 4 and so defining the scope of the exception as it deemed fit. Neither is there provision for the State Planning Committee to 'approve' such a definition which has the net effect of varying and/or defining the meaning of 'special projects' without following the due procedure expressly prescribed under the TCPA. A provision of the TCPA, that is the State Planning Committee's power under s 4(5) of the TCPA, cannot be interpreted to circumvent the application

of other provisions of the TCPA. In particular, s 4(5) cannot be exercised to bypass the power expressly provided in s 11(2) of the TCPA for the committee to 'trigger' the alteration procedure by directing the State Director to submit proposals for alterations to the plan. Fundamentally the interpretation of s 4(5) as providing the State Planning Committee with a power to effectively alter the structure plan vide administrative guidelines would devoid the alteration procedure intended by Parliament of any meaning or effect. It would also obstruct the TCPA's object of securing public participation through its procedures.

[153] The House of Lords decision in *Westminster City Council v Great Portland Estates Plc* [1985] AC 661 ('Wesminster City') as mentioned in leave question two is instructive for our present appeal. The local planning authority in that case, the city council, included in its local plan a policy that prohibited office development in certain parts of the city save in exceptional or special circumstances which are outlined not in the plan, but in non-statutory guidance. The applicants, a property company, applied under s 244(1) of the Town and Country Planning Act 1971 ('Act of 1971') to quash that policy in the local plan, on grounds that the city council failed to comply with Schedule 4 para 11(2) of the Act which requires that the local plan must contain their proposals for the development and use of land. Schedule 4 provides for a structure plan for Greater London, and para 11 provides that London borough councils may prepare local plans. Schedule 4 para 11(2) reads as follows:

> (2) The plan shall consist of a map and a written statement and shall—(a) formulate in such detail as the council think appropriate their proposals for the development and other use of land in the area ... or for any description of development and other use of such land ... (4) *In formulating their proposals in the plan the council shall — (a) secure that the proposals conform generally to the Greater London development plan* ... and (b) have regard to any information and any other considerations which appear to them to be relevant ... (Emphasis added.)

[154] The House of Lords upheld the Court of Appeal's decision in quashing this policy. The reasoning is provided by Lord Scarman at p 674:

> *The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land*: s 11 and Schedule 4, para 11 (2) of the Act of 1971. *If a local planning authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion*. But the council provides the answer to this point: it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon LJ demonstrated by his quotations from *paras 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone*.

It was the duty of the council under Schedule 4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone *the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections*. (Emphasis added.)

[155] The issue in *Westminster CC* serves as a useful analogy for our present appeal. The UK Act of 1971 mirrors, to a large extent, our TCPA. In *Westminster CC*, the city council had omitted to include proposals of policy in the local plan pursuant to the Act of 1971, and instead decided to express them in non-statutory guidelines. In the instant appeal, the State Planning Committee decided to bypass its power to trigger the alteration procedure under s 11(2) of the TCPA to include the policy on 'special projects' on hill land or slopes in the structure plan, and instead decided to express this policy in administrative guidelines. In both cases, the respective public body failed to comply with express statutory provisions which entailed, among other things, the duty to publicise drafts of its proposals and provide opportunity for objections to be heard. Similar to *Westminster CC*, the State Planning Committee can issue guidelines or directions that go 'only to detail', but such guidelines cannot themselves contain matters varying the existing structure plan relating to the control of development on hill lands or slopes. This is to be included in a statutory development plan, either the structure plan or a local plan.

[156] This position is in line with the established administrative law principle that any guidance setting out how decision-makers should exercise their discretionary powers must be published. Decision-makers are under a duty to comply with published policy, unless there are good reasons to the contrary (see the dissenting judgment in the UK Supreme Court decision of *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245). The reason why such policy documents must not be secret is obvious; publication allows for persons affected by the policy to anticipate the conduct of decision-makers and ensure decision-making is not carried out pursuant to unlawful guidance. Transparency is concomitant with good administration and accountability. Indeed, under the TCPA the right to know the existing policy followed by planning authorities is a necessary pre-condition to the ability to exercise the right under s 21(6) of the TCPA to make representations and object to planning approval where there is no local plan in place. Yet, in the instant appeal, the State Planning Committee chose to issue internal, unpublished guidelines instead of adhering to the public-facing alteration procedure provided in statute. This is a clear contravention of the TCPA.

[157] In concluding our analysis of *Westminster CC*, we wish to clarify some important differences between development plans under the UK's Act of 1971

and those under our TCPA. The first point of divergence concerns the status of development plans. We repeat and adopt what we have said in Part IX(B) as to the delineation between law and policy under the TCPA: the formulation of policies in the structure plan require the exercise of judgment concerning planning considerations. However, once the draft structure plan has been *gazetted*, the structure plan and its provisions attain statutory force. Further, the default position under the UK's Act of 1971 is that planning permission which fails to comply with the development plan may be granted if it is warranted by other material considerations. Where the Secretary of State has not made an order under s 31(1) of the UK's Act of 1971 for 'authorising the local planning authority ... to grant planning permission for development which does not accord with the provisions of the development plan', this default position prevails. This is unlike the position under the TCPA, in particular s 22(4) of the TCPA which prohibits the local authority from granting planning permission for a proposed development that contravenes the development plan. In line with our reasoning in Part IX(B) above, while slavish compliance with development plans under legislation in other jurisdictions may not be required, such compliance is required under the TCPA.

[158] It follows inexorably that the drafting, approval and issuance of the 'special projects guidelines' is in contravention of the express provisions of the TCPA. The issuance of these guidelines amounted in substance to a variation or alteration of the structure plan in material aspects and so contravened ss 11, 11A and 11B which collectively require that any such variation to a gazetted structure plan must go through the process of ensuring public participation and public awareness of the proposed amendment. In particular, the committee had bypassed its discretion under s 11(2) to trigger the alteration procedure and instead sought to effect such alterations vide unpublished internal guidelines issued, purportedly, under s 4(5). In the absence of any such empowering statutory provision, it follows that the working committee in embarking upon and implementing the 'special projects guidelines' was acting ultra vires its capacity and powers under the TCPA. As such the guidelines themselves, ie the 'special projects guidelines' themselves are invalid and devoid of any effect because they are not premised on any statutory basis and are in effect contrary to the express provisions of the TCPA, in light of ss 11, 11A and 11B .

[159] In summary therefore, it is evident that while the State Planning Committee is statutorily empowered to issue directives to the local authority in relation to matters pertaining, inter alia, to the grant of planning permission in relation to hill lands, it is equally clear that any such directives must be in compliance with the TCPA. Any attempt to deviate, revise, expand, alter or amend the substance of the structure plan through directions or guidelines would be outside the purview of that statutory power conferred on the State

Planning Committee pursuant to s 4(5). This is particularly clear from the provisions in ss 11, 11A and 12 as outlined earlier.

(C) 1996 Directive and Pelan Dasar vis a vis local plan under TCPA

[160] We now turn to the State Planning Committee directive issued in 1996 which directed the local authority to use the *Pelan Dasar* in its entirety. The High Court, and later affirmed by the Court of Appeal, held that the *Pelan Dasar* for all intents and purposes serves the function of a local plan. The reasoning is that in light of this directive purportedly made pursuant to s 4(5), the *Pelan Dasar* is to be treated as a local plan until a local plan is drafted or approved.

[161] In determining whether the *Pelan Dasar* can be treated as a local plan and so whether the 1996 directive was issued intra vires we will consider the provisions in the TCPA on the local plan.

(i) Local plan under the TCPA

[162] Section 12 defines how and when a draft local plan is to be prepared. Subsection (1) provides that a local authority should prepare a local plan while a draft structure plan is being prepared or prior to assent to the draft structure plan for the relevant area. Subsection (2) provides that where a structure plan for the State has come into effect the planning authority 'shall' as soon as practicable prepare a draft local plan for the whole of its area.

[163] The other subsections of s 12 detail the requirements of a draft local plan and how the plan is subject to scrutiny and review by the State Planning Committee as well as how to deal with alterations.

[164] Subsection 8 of s 12 is of importance because it provides that all proposals in a draft local plan shall conform generally to the structure plan for the State as it stands at that point in time, whether or not it has come into effect.

[165] More significantly, the local authority is bound by statute to ensure that the preparation of the draft local plan receives public participation at three important stages — firstly prior to the commencement of the preparation of a local plan. This is stipulated in s 12A. Secondly, once a draft is prepared, it is to be published in local newspapers and a time period is stipulated within which objections or representations may be made to the local authority, pursuant to s 13.

[166] Public participation is further ensured in s 14(1) where the local authority is required to cause a local inquiry or other hearing to be held by a Committee of three persons appointed by the State Planning Committee. This is to enable the public's objections and representations to be heard and considered fully. Section 56 provides that specific provisions of the Commission of Enquiry Act 1950 be applicable at such an inquiry. This evidences how important the element of public participation is when the draft local plan is prepared. And that is because once implemented it is the definitive document or plan to determine how the area in issue is to be developed. No deviation from the local plan is allowed, save and unless a similar process of amendment, variation or repeal is put through the public eye.

[167] Section 15(5) provides that a local plan shall conform to the structure plan, with a saving that if there is a difference between the local plan and the structure plan by reason of the structure plan being out of date, the State Planning Committee should refer the difference to the state authority for determination. That is of no applicability here.

[168] In the instant appeal, notwithstanding these express provisions, a draft local plan was not prepared either during the preparation of the draft structure plan or even after the structure plan for the State was *gazetted* in June 2007. Four years later, in March 2011, when Sunway's application was submitted, there was still no draft local plan in existence. Instead, and pursuant to the State Planning Committee's 1996 directive the local authority was operating on the basis of the *Pelan Dasar*, an interim zoning plan which was intended to substitute the 1973 Interim Zoning Plan which, in turn, was in use during the tenure of prior and repealed legislation.

(ii) Pelan Dasar cannot be treated as a local plan

[169] In light of the foregoing provisions of the TCPA, we have come to the conclusion that the High Court and Court of Appeal had erred in law in finding that the *Pelan Dasar* can be treated as a local plan and, following from this conclusion, that the 1996 directive was intra vires. Accordingly our decision is that the 1996 directive was ultra vires the State Planning Committee's power under s 4(5). We set out our reasons below.

[170] It is to be reiterated, again, that the State Planning Committee's power under s 4(5) of the TCPA must be exercised in conformity with the TCPA. As stated with respect to the guidelines, this power cannot be exercised to effectively circumvent or negate the application of other provisions of the TCPA, or, fundamentally, to obstruct the object and purpose of the TCPA such as public participation.

[171] The first point as to why the *Pelan Dasar* cannot be treated as a local plan is that, unlike the preparation of a local plan, there was no element of public participation in the drafting of the *Pelan Dasar*. The issuance of the 1996 directive essentially ousts the role of the public in being heard and influencing the way in which development takes place in their area. The 1996 directive obstructs a linchpin of the TCPA, that is the role of public participation in controlling development.

[172] Another factor is that in drafting the *Pelan Dasar*, there was no duty on the local authority to ensure that the *Pelan Dasar* was in conformity with the structure plan, whether or not the structure plan had come into effect. As the local authority had, essentially, free rein in formulating the *Pelan Dasar*, it is no surprise that ultimately this policy was inconsistent with the structure plan. The structure plan stipulates a general prohibition against development on hill land or slope, which would apply to the subject land. However part of the subject land was zoned for 'housing' or 'low density housing' under the *Pelan Dasar*.

This is a direct inconsistency with the provision of the structure plan.

[173] This then brings the *Pelan Dasar* to a further divergence from a local plan as envisioned under the TCPA, in particular how the TCPA governs inconsistencies between development plans. If a local plan had been drafted and approved, it would have to conform to the structure plan pursuant to s 15(5) of the TCPA. If there had been a local plan, any inconsistency between the local plan and structure plan may subsist only where the inconsistency is by reason of the structure plan being out of date, and the procedure set out in s 15(5) and (6) must be followed, such that there is an official declaration and notification of the said inconsistency. There is a two-tiered process involving both the State Planning Committee and state authority in deciding whether there is in fact an inconsistency between a local plan and structure plan. In contrast, the Pelan Dasar is not governed by such provisions, and there is no such procedure governing the determination of whether there is an inconsistency, and provisions on how to deal with such an inconsistency. There is no requirement of official publication declaring the said inconsistency.

[174] In summary the *Pelan Dasar* was not, in any way, equivalent in nature, substance or effect as a local plan under the TCPA. The attempt to accord the *Pelan Dasar* the same status as a local plan is clearly a contravention of the TCPA. Further, the substance of the Pelan Dasar fails to conform with the structure plan, in particular the latter's general prohibition of housing development on hill slopes. We thus find that the 1996 directive issued by the State Planning Committee was ultra vires its power under s 4(5) of the TCPA.

(D) Delegation and s 22(2A)(c) of the TCPA

[175] In exercising its power under s 4(5) of the TCPA consistently with the TCPA, this power must be exercised consistently with, inter alia, the prohibition against granting planning permission for proposed development projects that would contravene any provision of the development plan. This is provided under s 22(4) of the TCPA read together with s 20. As highlighted in Part IX(B), the structure plan has statutory force and requires compliance. On the whole this in effect limits the scope of the committee's power under s 4(5). Directives cannot be issued where it would contravene the structure plan.

[176] It is to be recalled that the structure plan provides that, even where a proposed development constitutes a 'special project', there are still conditions that need to be met. As stipulated in DK3 L4 one of these conditions was to obtain the State Planning Committee's approval. Reading together DK3 L4 of the structure plan together with the TCPA, in particular s 22(2A), there was a clear aim of ensuring that there was a tiered process where an application concerned hill land or hill slopes. After the local authority decided that the application falls under 'special projects', the application is to be referred to the State Planning Committee for their approval. It is then that the State Planning Committee is under a duty pursuant to s 22(2A) of the TCPA to request from the NPPC for its advice on the application submitted.

[177] Yet, by virtue of the special projects guidelines, the three-tiered process provided by the TCPA and structure plan was effectively negated and replaced with a one-step process: in the context of development affecting hill slopes, the decision lay only with the local authorit y without any further checks and balances provided by a State-level or Federal-level body. This is evidently contrary to the provisions of the TCPA and its object and purpose of ensuring integration between Federal and State as to town and country planning, as well as environmental protection.

[178] In addition, where entrusted to exercise a discretionary power the State Planning Committee cannot, in purported exercise of such power, relinquish its power to be exercised by another body such as the local authority. This was the purported effect of the special projects guidelines where it provided that, upon a local authority finding that a proposed development falls under one of the two exceptions, there is to be no further reference to the State Planning Committee for reasons of expediency.

[179] The Court of Appeal had affirmed the High Court's finding that there was no delegation of power and that instead the State Planning Committee had exercised its functions by 'pre-determining' the two categories of development which constitutes a 'special project' under DK3 L4 of the structure plan. We cannot agree with this finding. In substance, the State Planning Committee did delegate its role and discretion to the local planning authority. The

'pre-determination' of what constitutes a special project does not engage with the issue of delegation. The structure plan requires that even where a project falls under a 'special project', further conditions need to be met including approval from the State Planning Committee. By directing that where a local authority decides that a proposed development constitutes a 'special project' according to the committee's guidelines, the local authority should not make any further reference to the committee, the committee effectively had delegated its discretion provided for under DK3 L4 of the structure plan. It delegated to the local authority the decision-making process in considering the materials specific to the proposed development at hand, and to decide whether or not to grant its approval to a 'special project'. We are thus in agreement with the finding and reasoning of the appeal board, in that this exercise of discretion was non-delegable and the purported delegation was invalid and devoid of any effect.

[180] Moreover, by effectively removing one of the requirements set out in the structure plan, that is the requirement to obtain the State Planning Committee's approval provided under DK3 L4, this amounts to a purported alteration of the structure plan. For reasons set out above in Part X(B), this is beyond the scope of the committee's power under s 4(5). The direction that no further reference is to be made to the committee was ultra vires the TCPA.

[181] We wish to further highlight the significance of the State Planning Committee's purported delegation of discretion, that is the issue of the committee's duty to consult the NPPC (NPPC) pursuant to s 22(2A)(c) of the TCPA. This subsection provides that where a development affects hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan, the State Planning Committee shall request from the Council its advice on the application submitted. This requires notification of a development on an environmentally sensitive area, such as the present case, to be referred to the NPPC by the State Planning Committee for its advice. It is evident from the statutory provision that the building of developments on hill lands and hill slopes is viewed with grave caution and not to be granted lightly. This may be gleaned from the necessity for a State to notify and obtain the advice from a central or federal body. It is moreover necessary to maintain and improve the physical environment and to ensure that it is sustainable development and not any development that is granted planning permission in relation to hill lands.

[182] In this regard, we adopt our observations under Part VIII(B) above regarding the object and purpose of the TCPA, including the make-up of the NPPC, its role and its functions. In summary, one of the functions of the NPPC is the promotion within the entire country and the framework of national policy, town and country planning as an effective and efficient instrument for the improvement of the physical environment and towards

achievement of sustainable development in the country. Thus the importance of sustainable development and the improvement of the physical environment is expressly underscored by s 2A of the TCPA. It is in this context that hill side development is required to be referred expressly to the NPPC. In the instant appeal there is nothing to indicate that any such reference was submitted to the NPPC by the State Planning Committee. That is a statutory pre-requisite in the treatment of planning approval under s 22 of the TCPA.

[183] Learned counsel for Sunway took the position that as such a duty falls on the State Planning Committee which is not a party to these proceedings, this was not a matter which should be considered by the court, notwithstanding that it has been raised by the appellants. In effect, learned counsel was asking the court to ignore or give no consideration whatsoever to an express statutory provision in the planning approval process, simply because it was not the local authority itself that was tasked with referring the matter to the NPPC.

[184] We adopt the reasoning we have indicated earlier in Part VII. A contravention of the Act cannot be ignored simply because it is the State Planning Committee which is so tasked. As stated earlier it is the local authority that is statutorily required to make the final decision as to whether or not planning approval should be allowed, rejected or allowed or rejected in part. A mandatory and statutorily prescribed step in the process of planning approval requires the local authority to ensure that all requirements of the TCPA are met. Section 22(2A) is one such section. If it is not met, as is the case here, is it legally correct or rational to suggest that this essential requirement can simply be ignored because the State Planning Committee is not a party?

[185] We stated earlier that there is no question of several other entities being joined as a party as ultimately the challenge here is to planning approval granted by the local authority. It is again irrational to suggest that every single entity in the course of the planning process be included or joined as a party. What is of importance is that the substance of the Act is complied with and that obligation falls upon the local authority, in relation to the approval or rejection of planning permission.

[186] What lends further credence to this conclusion is the fact that, as the State Planning Committee had purportedly delegated its function of approval and oversight to the local authority, how could the State Planning Committee make such a reference to the NPPC if it was not even aware of the existence of such an application? As such, the direction given by the local authority to not make any further reference to the State Planning Committee contravened s 22(2A) of the TCPA, as the direction bypassed the express obligation on the committee to request the advice of the NPPC in the circumstances of the

present case. In the face of such a clear contravention, the direction given by the State Planning Committee was invalid and tainted by such non-compliance. The local authority, in relying and acting on such a tainted direction, acted in contravention of the TPCA in making its decision to grant planning permission pursuant to s 22(2A).

(E) Were the directives intra vires?

[187] In light of the foregoing reasons, we find that the special project guidelines were ultra vires the TCPA on the basis that they contravened various provisions of the TCPA, including the provisions on alteration and s 22(2A), and they contained an invalid delegation of power. In similar vein the State Planning Committee's 1996 directive in relation to the *Pelan Dasar* contravened the TCPA as it unlawfully sought to give the Pelan Dasar the same status as a local plan.

XI. INTERPRETATION OF S 22 OF THE TCPA

(A) Power to decide on applications for planning approval

[188] The local authority's power to decide on applications for planning permission is primarily housed under s 22 of the TCPA, and is further contoured by other relevant provisions of the TCPA.

[189] Section 22 provides for the local authority's power to consider and decide on applications for planning permission. Section 22(2) provides that the local authority has an obligation to consider 'such matters as are in its opinion expedient or necessary for proper planning', in particular and among other matters, the provisions of the development plan (s 22(2)(a)), direction given by the State Planning Committee if any (s 22(2)(aa)), and objections made under s 21 (s 22(2)(c)).

[190] In relation to directions given by the State Planning Committee, the local authority has a duty to comply with such directions provided that the directions are consistent with the TCPA. This is provided under s 4(5) of the TCPA read together with s 22(2)(aa) and s 22(4)(aa) of the TCPA.

[191] Section 22(4) of the TCPA is an invalidating clause. This section deals with the factors that prohibit or preclude the local authority from granting planning permission.

> (4) The local planning authority shall not grant planning permission if —
>
> (a) the development in respect of which the permission is applied for would contravene any provision of the development plan;

(aa) the development in respect of which the permission is applied for would contravene the provision of paragraph (2)(aa); A

(b) ...

[192] Section 22(4)(a) specifically prohibits or precludes planning permission where the development would contravene the development plan. B

(B) Whether the local authority's reliance on directives of the State Planning Committee was lawful

C

[193] In light of the above provisions, we now turn to consider whether the local authority had lawfully exercised its powers under s 22 of the TCPA in deciding to approve Sunway's application.

[194] We refer to our reasoning and findings in Part X above, in that the following directives of the State Planning Committee were ultra vires the TCPA and devoid of any effect: the directive in 1996 for the *Pelan Dasar* to be used in its entirety until a local plan is *gazetted*, in effect a directive for the *Pelan Dasar* to be treated as a local plan; and the special project guidelines, particularly its definition of 'special projects' and its invalid delegation of discretion from the State Planning Committee to the local authority. D E

[195] It was argued by learned counsel for the first respondent that weight given to material considerations is entirely within the discretion of the local authority and would not affect the validity of the planning approval. This is not entirely accurate. Although the committee's directions are within the list of considerations to be considered by the local authority, this cannot be understood to mean that the local authority is bound to consider directions that contravene the TCPA. We have made this point in Part X(B), and wish to underscore it further here. Directions issued by the committee which are ultra vires and thus unlawful would not be a relevant consideration for the local authority to take into account, expressly for the reason that such directions were made in contravention of the TCPA and so do not advance the legislative intent behind the statute, including its object and purpose. By considering irrelevant considerations, that is the ultra vires directions by the State Planning Committee, the local authority went beyond the scope of its powers under s 22 and contravened the TCPA in relation to the planning approval granted to Sunway. F G H

[196] We will now consider particular issues that arise in relation to the *Pelan Dasar*. An issue that arises before this court is whether the local authority, in operating on the basis of the *Pelan Dasar*, had contravened express provisions under the TCPA. The TCPA came into force in the state of Penang in 1983. The structure plan was *gazetted* in June 2007. Notwithstanding these two I

events, and the express provisions of the TCPA in relation to the preparation and approval of draft local plans in ss 12 to 16 inclusive, there does not appear to have been any attempt made to embark on the drafting of a local plan. It was submitted by learned counsel for the local authority that instead, the local authority relied on and used the *Pelan Dasar* as per the 1996 directive issued by the State Planning Committee.

[197] The question that arises for consideration is whether such use of the *Pelan Dasar* is in compliance with the TCPA. There is no provision under the TCPA for the continued use of:

(a) repealed legislation; and

(b) plans under such legislation which are consequently similarly repealed.

to be resurrected and utilised in substitution of the local plan. Any such use would be restricted to developments where permission was granted under the repealed legislation by way of saving.

[198] More significantly, there is no provision for such use under the TCPA, some 28 years after the Act came into use, and some four years after the structure plan was *gazetted* for use.

[199] The continued use of the *Pelan Dasar* for which there is no provision in the TCPA, therefore amounts to a contravention of the Act by the local authority. The local authority's continued use of the *Pelan Dasar* also contravenes s 12 of the TCPA which requires the local authority to prepare and have ready a draft local plan at the time of the preparation of the structure plan or as soon as practicable after it had come into effect.

[200] The local authority's reliance on the fact that such use was approved by the State Planning Committee internally, vis a vis the local authority, as explained earlier provides no answer, because that neither extinguishes nor remedies the contravention. This issue is of primary importance because the local authority has expressly stipulated that it relies on the *Pelan Dasar* as being the basis for the grant of approval. However there is no provision in the TCPA that allows for the local authority to rely on the *Pelan Dasar*, which ultimately emanates from repealed legislation as an interim measure, to be so utilised as the basis for approval.

[201] The local authority relies on s 22(2)(aa) to maintain that it is entitled to do so. The provision reads as follows:

> (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular —

(a) the provisions of the development plan, if any; A

(aa) the direction given by the committee, if any; ...

[202] In other words, as a directive was issued by the Committee to the effect that the *Pelan Dasar* could be relied upon, the local authority maintains that there was full compliance with the TCPA vide s 22(2)(aa). The issue that arises for consideration however is whether the said subsection can possibly be intended to refer to any direction given by the State Planning Committee, particularly in the context of the purpose and object of the TCPA and in light of our finding above in Part X that the said direction was ultra vires the TCPA. B C

[203] Put another way, is that a reasonable or rational means of interpreting s 22(2)(aa)? Is it the case that sub-s 22(2)(aa) is to be construed such that:

(a) compliance is required in respect of any and all directives issued by the State Planning Committee, notwithstanding the validity of such a directive? D

(b) compliance is required even in respect of a directive issued, which approves the continued use of a zoning plan that was produced under repealed legislation, with no statutory provision allowing for its continued use? E

(c) is the subsection to be read *in vacuo* or textually or literally, having regard solely to the words set out there, without regard to the rest of the section or the Act as a whole? and F

(d) or is it the case that s 22(2)(aa) is to be read contextually ie in the context of the entirety of the section as well as the TCPA, such that 'the direction given by the committee, if any' relates to matters which are expedient or necessary for proper planning, and which is consonant with the purpose and object of the TCPA? G

[204] After due deliberation, the conclusion we reach is that:

(a) with reference to our reasoning and findings in Part VI, the validity or invalidity of a directive issued by the State Planning Committee and to be utilised by the local authority in deciding on planning approval is a crucial underlying matter which affects the ultimate decision of the local authority. A directive is issued by reason of and under the purview of the Act, here the TCPA. It follows that the entity issuing such a directive must be empowered by statute to do so, and significantly that any such directive is in compliance with the relevant statute, here the TCPA. If a directive is issued without statutory basis, or is issued in contravention of the TCPA, then its validity is doubtful if not invalid; H I

(b) there is no provision empowering the State Planning Committee, express or implied, to utilise repealed zoning plans as the basis for planning approval, at the behest of the local authority. As set out in Part X it is not within the State Planning Committee's power under s 4(5) to issue directions providing that the *Pelan Dasar* is to be treated as a local plan. The local authority is similarly not empowered to exercise its decision-making authority under the TCPA, on the basis of plans produced under repealed legislation and to treat such plans as being equivalent to a local plan. To that extent, it follows that any planning approval granted pursuant to, or premised on the *Pelan Dasar* is invalid. It also follows that s 4(5) cannot afford an answer to, nor withstand a challenge as to the validity of the use of repealed zoning plans by the local authority to determine planning approval. The root or basis for the grant of approval is tainted;

(c) if s 22(2)(aa) is read *in vacuo*, as we are invited to by the local authority, what it means is that any directive issued by the State Planning Committee without regard whatsoever to the rest of the section or the TCPA as a whole will require compliance. It would require sub-s (aa) to be read without any regard for sub-s (2), and all the other limbs comprising a part of sub-s (2). In short, we are invited to read (aa) not only disjunctively, but disjunctively even from sub-s (2). That is not a rational legal construction to be adopted in the field of statutory construction. By way of example, should a higher authority issue a directive to the local authority to use the Town and Country Enactment instead of the TCPA, can it be said that the local authority has to comply? The answer would be a vehement no, as that statute has been repealed. Similarly, if a directive has been issued to comply and utilise a zoning plan issued under repealed legislation, is compliance required? Again, the answer must be no. It would be perverse to construe s 22(2)(aa) as having been drafted with the specific purpose of it being read literally and *in vacuo*. As stated at the outset, a grammarian approach should not be adopted in statutory interpretation, as the function of the courts is not to read the Malay or English language in a statute and give its literal and grammatical meaning per se. Instead, the duty of the courts is to construe the purpose and function of the statute for the ultimate benefit of the public as a whole. That requires an objective and contextual approach to be adopted;

(d) the local authority, as the entity responsible for the issuance of planning approval, has a duty to comply with the provisions of the TCPA, both in terms of specific sections, as well as the purpose and context of the Act as a whole. As stated elsewhere, it is statutorily provided in s 17A of the Interpretation Acts that in construing a provision in a statute, it is incumbent upon the court to consider the express words used in the context of the object and purpose of the statute read as a whole. In other

words, it is essential that the sub-s is read contextually. When s 22(2)(a) is read contextually it follows that it refers to 'the' direction given by the committee if any, within the context of the material factors to be taken into account in deciding on planning approval. It envisages a directive that is in complete compliance with, and within the scope of the TCPA, taken as a whole.

[205] Although the local authority had taken the position that the *Pelan Dasar* serves the function of a local plan, it appears that there was an implicit recognition by the local authority that the *Pelan Dasar* cannot equated to a local plan when it issued notices pursuant to s 21(6) of the TCPA and thereafter conducted a hearing pursuant to s 21(7). Section 21 deals with an application for planning permission by any applicant. Sub-section (1) to (5) set out the matters, particulars and conditions that the applicant has to submit and comply with, in order to have its application considered for approval. Subsections (6) and (7) and of s 21 provide as follows:

> (6) If the proposed development is located in an area *in respect of which no local plan exists for the time being*, then, upon receipt of an application for planning permission ... the local authority *shall*, by notice in writing served on the owners of the neighbouring lands inform them of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.
>
> (7) If objections are received pursuant to subsection (6), *the local planning authority shall* , within thirty days after the expiry of the period within which objections may be made, *hear* —
>
> (a) the applicant for planning permission; and
>
> (b) *any person who has lodged an objection pursuant to subsection (6) and who, in lodging the objection, has requested a hearing* . (Emphasis added.)

[206] Sub-sections (6) and 7 of s 21 begs the question why it is necessary to give the relevant owners 'notice' to enable them to object to the proposed development , and for these objections to be heard. The provision only comes into play where no local plan subsists at the time. That is the case in the instant appeal. In fact in the instant appeal, the local authority duly complied with both sub-ss (6) and (7) of s 21.

[207] Taking the argument that the *Pelan Dasar* can substitute a local plan to its fullest, there would be no requirement to comply with s 21(6) and (7) of the TCPA. Yet, it appears that the local authority recognised that the TCPA ensures two points at which owners of neighbouring lands are to be given the opportunity to object and to be heard with respect to development in their area: first, during the drafting and approval process of the structure plan; and second, during the drafting and approval process of the local plan. In the

absence of a local plan this opportunity would be denied to them, not to mention other segments of the public. As such, where there is no local plan, s 21(6) and (7) fills in this lacuna to some extent as it allows the owners of neighbouring lands that second opportunity to participate in and to be heard in respect of development in the area. By complying with s 21(6) and (7) of the TCPA the local authority appears to have recognised, at least to some degree, that the *Pelan Dasar* was not equivalent to the local plan and as a result measures were needed to fill in this lacuna. It is with respect logically inconsistent to, on the one hand, state that the *Pelan Dasar* can effectively substitute the local plan while on the other recognizing that s 21(6) and (7) of the TCPA must be complied with, given that as far as the local authority is concerned it is in accordance with the provisions of the TPCA, and therefore valid in law, to utilise the *Pelan Dasar* to determine planning approvals where there is no local plan.

[208] For all the reasons set out above, we are compelled to conclude that the use of the *Pelan Dasar* or zoning plan produced under previous legislation which stood repealed at the time of this application for planning permission was invalid in law. It fails to conform with the structure plan and amounts to a contravention of the TCPA. The structure plan prevails as the applicable statutory development plan for that area and other policies must conform to it. Section 4(5) affords no remedy to the local authority as the contravention goes to the root of the basis for the grant of planning approval. As it is premised on an invalid basis, it is similarly invalid and bad in law.

XII. INTERPRETATION OF SPECIAL PROJECTS GUIDELINES

[209] Even if the special projects guidelines, more specifically DK3 L4 is considered to be intra vires the TCPA, then its interpretation ought not to be such that it conflicts with the structure plan. That would be contrary to the purpose and object of the TCPA.

[210] The matter of construction of the special projects guidelines requires mature consideration, including the consideration of the context of the TCPA, the structure plan and the National Land Code, and does not encourage a grammarian approach in relation to punctuation in the English language.

[211] This issue of the proper interpretation to be accorded to DK3 L4, formed the core basis for the decisions of the High Court and the Court of Appeal. The Court of Appeal essentially adopted the arguments of the High Court *in toto*. The reality is that the issue of interpretation only arises for consideration if the special projects guidelines are in point of fact legally valid. In view of the conclusion above, in Part X(B) (paras 144–159), Part X(C) (paras 160–174), Part X(D) (paras 175–186) as well as Part X(E) (para 187),

we have found that the special project guidelines and the 1996 directive contravened the TCPA and thus were ultra vires the said Act, it would appear that this question is moot.

[212] The High Court and Court of Appeal erred in restricting their review solely to this one issue as explained above. Both courts failed to appreciate or consider the validity of the guidelines in the context of the TPCA. The courts below should have adopted a contextual approach in considering both the validity and context of the guidelines in line with s 17A of the Interpretation Acts 1948 and 1967 (Act 388).

XIII. RIGHT TO BE HEARD AND DUTY TO GIVE REASONS

(A) Section 21(6) and (7) of the TCPA

[213] We refer to Part XI(B) above, and our consideration of s 21(6) and (7) of the TCPA which provides that where there is no local plan, the local authority is under a duty to notify owners of neighbouring lands of their right to object to an application for planning permission and, where a hearing has been requested, a duty to hear those objections.

[214] As outlined in the background facts in Part IV above, objections were put forward, and the requisite meeting was held. There was however no feedback accorded to the adjoining owners of neighbouring lands on the substance of their objections. They were merely notified of the fact of planning approval granted to Sunway, well after Sunway had been advised of the same.

[215] This brings to the fore the question of what amounts to the right to be 'heard' under s 21(7). Is the 'right to be heard' to be accorded:

(a) a literal and grammarian meaning, namely of being allowed to verbally express objections at a meeting and without more; or

(b) does it extend to a right to the neighbouring landowners to set out their objections, for those objections to be considered and weighed in the course of the planning approval process and for these landowners to be advised of the approval or rejection of such objections, and reasons for the same?

[216] It is relevant that in determining this issue, once again the purpose and object of these sections and of the Act as a whole are considered. It has already been said in Part XI(B) above that the purpose of s 21(6) and (7) is to afford an opportunity to neighbouring landowners to participate in the development in their area in place of the public participation that is statutorily provided for in other sections of the TCPA. It is equally apparent that with respect to the

approval process of the draft structure plan and draft local plan, public participation is ensured by way of the opportunity to object and the consideration of that objection by the relevant authority. If s 21(6) and (7) afford this opportunity to those who cannot be heard by reason of the absence of a local plan, then it can only follow that their right to be heard is not a perfunctory right but one that is substantive. Substantive in the context of having their objections not only heard, but also considered and weighed in the process of the grant, rejection or partial grant of planning approval. Otherwise, the purpose of filling in a lacuna created by the lack of a local plan would not be fulfilled. Sections 14 and 15 allow for public participation in relation to a local plan. If the landowners' objections are not apparently taken into consideration nor any reasons given for their approval or rejection, then it cannot be said that such objections have in fact been considered in the course of the planning approval process.

[217] Such a construction is supported by s 22(1) dealing with the treatment of an application for planning approval. It provides:

> 22(1) *As soon as possible after the receipt of an application for planning permission, or if the application is one to which subsection 21(6) applies, as soon as possible after the expiry of the period within which objections may be made, or if objections have been made, as soon as possible after the objections have been dealt with under subsection 21(7)*, the local authority shall decide on the application for planning permission ... (Emphasis added.)

[218] It is evident from the statutory language utilised, namely 'as soon as possible after the objections have been dealt with'. The words used are 'dealt with' not 'heard'. The use of the term 'dealt with' does not merely mean being 'heard' in the literal or grammarian sense of listening. It carries with it the meaning of being heard as well as disposed of or resolved, one way or another. That in tur n encompasses or incorporates the elements of the objections being considered and resolved, either by acceptance, rejection or a partial acceptance or rejection. And, a decision having been made on those objections, such decision should be communicated to the neighbouring landowners.

[219] Such an interpretation finds statutory support in s 22(2)(c) where it is provided that in dealing with the application for planning permission the local panning authority shall take into consideration such matters as are necessary for proper planning and in particular the objections made under s 21. Therefore, there is express statutory support for the interpretation that it is insufficient to merely 'hear' the objections of neighbouring landowners. It is necessary to take into consideration the objections as part of the planning approval process and to weigh them up.

(B) The present appeal — Was there a duty to give reasons?

[220] It is not apparent in the instant case that any such deliberation was in point of fact undertaken. There is nothing in the appeal record which suggests this was complied with. While the local authority may well contend that the objectors were duly advised that their objections were not accepted, the purport of these sub-ss requires more than simply advising the objectors of a rejection of their objections. As stated earlier it requires the local authority to give some reasons as to why the objections were rejected. These reasons do not have to be legalistic and full of detail but should be sufficient to convey to the objectors the lack of merit in their objections, or why they were otherwise dismissed. These several matters comprise collectively the essential core of the right to be heard, which is embodied in s 21(6), 21(7) and 22(2)(c).

[221] In the instant appeal, in the absence of any documentary or oral averment to the effect that the objections were given due consideration, but were rejected for specific reasons, the inexorable conclusion to be drawn is that while the landowners were 'heard' in the literal and grammarian sense, there is nothing to suggest that their objections were considered as a relevant matter for the purposes of determining whether or not to grant or reject approval. Such consideration of the objections could have been evidenced, as is the case in other jurisdictions such as the United Kingdom (from which our legislation stems), by a letter or other document setting out briefly the reasons for the acceptance or rejection of the landowners' objections (see *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71; *R (on the application of CPRE Kent) v Dover District Council and another* [2017] UKSC 79 per Lord Carnwath on the duty to give reasons in administrative law).

[222] Case-law on the subject of an obligation to give reasons within the context of the 'right to be heard' in this jurisdiction is scarce. The general legal stance adopted is that there is no duty to give reasons as there is no express statutory provision requiring it. However, the lack of an express statutory provision requiring the local authority to give reasons for its approval does not equate to a conclusion that there is no duty to give reasons at all ; such a prima facie preclusion of this duty would reduce transparency in the decision-making process. We wish to highlight this court's decision in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 which held that where the Director General of Trade Unions exercises his powers and/or discretion and makes a decision under s 12 of the Trade Union Act 1959, the Director General must provide a reason for its decision. We cite the relevant paragraphs below on the right to be heard and the duty to give reasons:

> [74] *The duty to consult, which essentially is a duty to give a hearing and the need to give reasons by decision making bodies goes hand in hand. They must go together*. In *Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and others* [1971] 1 All ER 1148 Lord Denning observed that where

A a person 'has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him accordingly, as the case may demand'. This view was earlier followed by this court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; B [1999] 3 CLJ 65 (FC).

...

[86] It is also settled public law principle and principle of natural justice that a public decision making body is under a duty to give reasons for its decision. Indeed, a reasoned decisions can be an additional constituent of the concept of fairness C (*Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193). The giving of reason is also one of the fundamentals of good administration.

[87] *The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give* D *reason unless that very statute specifies that no reason needs be given . The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the publ ic at large*. (Emphasis added.)

E **[223]** Adopting the stance that there is no duty to give reasons due to the absence of an express provision requiring so, would run awry of the general purpose and object of the Act, which is premised to a considerable extent on allowing for public participation in sustainable development. This is particularly so, where persons accorded express standing to be advised of, and F to be heard in respect of the development are concerned. As owners of neighbouring lands, they have a close interest in the outcome of the application. The law recognizes this fact by according them the opportunity to make representations at a hearing. By doing so they hope to influence the decision by participating in that decision. Their statutorily provided rights G would be diluted and rendered nugatory, if they were simply heard but never advised of the reasons why their objections were rejected or planning approval granted.

[224] It is important to emphasise that given the express provisions of the H structure plan, an important objective of the same is to preserve special features of the landscape in the region, including hill lands and hill slopes. Their preservation is important for environmental safety, beauty and the special quality of life they confer in that region. This is expressly recognised in the structure plan and given importance under the NPPC. Therefore, any I deviation from such a fundamental feature, meaning development on hill lands and hill slopes requires strong reasons for interfering with these areas. To fail to recognize and enforce an obligation to give reasons to these owners, as arising pursuant to the statutory entitlement to be heard under s 21(6) and (7) would be inimical to the purpose and object of these statutory provisions. It would

amount to denying parties who have a close and substantial interest in the decision from being appraised of the reasons why such a decision was taken. In other words, a right to know the reasons for the grant, rejection or partial grant of planning approval may be inferred or read into the statutory right to be heard.

[225] It is also of importance that persons enjoying such standing comprehend why a particular decision was made by the local authority so as to ascertain whether such a decision was lawfully made and to challenge such decision if they are of the view that it was not. In that sense, the duty to give reasons is a corollary of the statutory right of appeal granted to those who have made objections under s 21(6), as provided under s 23(1)(b) of the TCPA.

[226] Apart from their statutorily entrenched rights, they also enjoy rights as citizens who have a legitimate interest to know how important decisions affecting their surrounding areas, and which have the potential to affect the quality of their lives, have been reached. This is particularly so where they have made representations and been heard. While each and every aspect of detailed representations cannot reasonably be expected to be individually and fully addressed, they can expect to be advised in general terms of what the planning authority thought were the advantages and disadvantages of a particular development, such as the Sunway development, and why approval outweighed rejection of the same, given the risks of development on hill lands and hill slopes. Again, this is particularly so where the structure plan generally prohibits such development save in a narrow category of 'special projects'.

[227] The giving of reasons promotes the purpose of ensuring that decisions of the local authority are transparent under the TCPA. It also accords with the general duty of fairness which again arises because of the continuing interest these parties have in the nature of the environment they live in. In this context the decision of the UK Supreme Court in *R (on the application of CPRE Kent) v Dover District Council and another* [2017] UKSC 79 *('Dover District Council')* considered the issue of the duty to give reasons in administrative law.

[228] Although the legislation in the UK is not on all fours with our legislation, the underlying principle relating to the duty to give reasons in planning law and the concept of 'fairness' in a statutory context and its applicability, is relevant. It is relevant because it explains the need to provide reasons as a matter of transparency and fairness to objectors, as well as to enable the courts to undertake their essential supervisory function where challenges to the legality of the local authority's decision are made.

[229] In *Dover District Council*, the local authority granted planning permission in the Kent Downs, an Area of Outstanding Beauty. Against the

advice of its professional advisers, the local authority granted the application, given the positive economic impact the development would have in the region. It was not in dispute that the local authority had breached its obligations under certain environmental impact assessment regulations which required it to 'set out the main reasons and considerations for its decision'. This in itself distinguishes the case from our present appeal in that there is no such regulation requiring the giving of reasons expressly. In *Dover District Council* however, the issue of the remedy in those circumstances was unresolved and Lord Carnwath went on to discuss the issue of the obligation to give reasons.

[230] He accepted that there was no general duty to give reasons at common law (see para 51). Following *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, he concluded that reasons are required where they are necessary to permit the courts to scrutinize the underlying decision effectively:

> Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. Doody itself involved such an application of the common law principle of 'fairness' in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision (see para 54).

[231] In short, a common law duty of 'fairness' inherent in the statute gives rise to an obligation to give reasons for an administrative decision. It also enabled an affected individual to then challenge the legality of that decision.

[232] And in *Oakley v South Cambridgeshire District Council* it was held that 'openness and fairness to objectors required the members' reasons to be stated' (at para 57 of the case).

[233] The separate, though related rational basis for the duty to give reasons are on the one hand, openness or transparency and on the other, the effective supervision of administrative decisions by the courts. Given the purpose and object of the TCPA, the need to give reasons only arises specifically under s 21(6) and 21(7) in circumstances where the local authority has not drawn up a local plan. Theoretically at least, the number of cases requiring reasons to be proffered should therefore be minimal. As such the possibility of local authorities having to provide reasons in a huge number of cases is curtailed.

[234] That in turn begs the question in which cases should the local authority provide reasons for its decision? Certainly, cases falling within s 21(6) where there is no local plan require some clarification. Otherwise as explained before, the purpose of notifying and receiving and hearing objections will be entirely

nugatory. In any event, the reason-giving requirement in these sections are not difficult to identify. A

[235] The statutory provisions in s 21(6) and 21(7), not to mention s 22(2), all require that the objectors are advised of the reasons for the final decision. In this jurisdiction the need to give reasons is inherent within these sections, which deal with a situation where there is no local plan. In cases where there is a local plan and it has been followed, there would be no cause for complaint because the local plan which follows the structure plan would have received the requisite public participation which in turn would be taken into account in arriving at the final structure plan and local plan. B C

[236] The decision of the local authority in the instant case involved development on hill lands, which the neighbouring landowners maintain, did not comply with, and possibly contravened the structure plan. It would require very strong reasons for the local authority to deviate from the structure plan and it follows that affected persons, such as the appellants here, have a right to be told why the local authority considers the Sunway development as justified notwithstanding its adverse effect on the hill lands. D E

[237] The public interest element that is implicit in the TCPA requires that the relevant decision maker, here the local authority, has considered matters properly and it comes to the fore in a case such as this where the grant of planning permission is a departure from the structure plan and the general policy of the preservation of hill lands and hill slopes. That in itself warrants the giving of reasons for such departure. The giving of reasons ensures that the decision maker has given sufficient and careful consideration to the sensitive matters involved here. This is in line with the general expectation of the public that local authority decisions will comply with the local structure plan and with national policy in relation to hill lands. While in certain circumstances development which deviates from the general policy may be required and to that extent is not aberrant or irrational, it will remain important for the decision maker namely the local authority to explain or justify the decision, in terms of why such development should override the policy interests set out in the structure plan. F G H

[238] Apart from the clear statutory intent expressed in ss 21(6), (7) and 22(2), it is also important in the context of the good and bona fide administration of local authorities for reasons to be given. It ensures transparency in decision making by these entities and defeats speculation as to a lack of bona fides, irrationality which arise when there is genuine doubt as to why a decision has been made in a particular way. I

[239] In summary therefore, particularly on the facts of the instant case, these matters, namely deviation from the structure plan, reliance on committee drafted definitions outside the purview of the TCPA and deviation from national policy require that reasons should have been given, inter alia, to the appellants for the local authority's decision to grant planning permission to Sunway for its development.

(XIV) RELATIONSHIP BETWEEN TCPA, NATIONAL LAND CODE, AND LAND CONSERVATION ACT 1960

[240] It is evident to us that any application for planning permission must be subject to planning regulatory laws, and where there is an inconsistency between the category of land use under the National Land Code and planning control under the TCPA, the TCPA would prevail. This is clear from the line of authorities on this matter, as highlighted in the appellants' submissions including the Court of Appeal decision in *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 ('Visamaya'). It is worth reproducing from *Visamaya* the relevant paragraphs on the relationship between the National Land Code and TCPA:

> [17] In so doing the High Court failed to take into consideration that the NLC was enacted in 1965 while the TCPA was enacted in 1976. Parliament cannot be held to be ignorant of the NLC enacted in 1965. On the contrary, Parliament being aware of the NLC it passed in 1965, *the approach to interpretation must be*:
>
> (a) *parliament intended that the TCPA be read consistent with the NLC; and if not possible*; and
>
> (b) *the TCPA, as the later legislation prevails*.
>
> [18] *The NLC provided in general terms for land use for agriculture, building, and industry. Conditions in individual titles are too cumbersome a means for the purpose of planning development*. Before the NLC, a large number of land titles had been issued. There were other laws and by-laws. It is to these that s 108 was directed. *Section 108, however, cannot apply to laws passed subsequently by Parliament and regulations authorised thereunder*.
>
> [19] We, *therefore, hold the submission that s 108 renders the TCPA and zoning thereunder inconsistent with land use under the NLC titles null and void holds no merit*.
>
> [20] The TCPA provided specifically for the proper control and regulation of town and country planning in Peninsular Malaysia and for purposes connected therewith or ancillary thereto. *While the NLC addresses land use in individual titles, the TCPA addresses planning by land use zones*. By the t ime the TCPA was promulgated, large numbers of land titles had been issued, with condition of use as often as not that differs from the zoning. For planned development to succeed, *obviously if the condition of use in the title is in conflict with the zoning, the condition is almost routinely amended to the use authorised by the zoning*. (Emphasis added.)

[241] We are, to a large extent, in agreement with the Court of Appeal in *Visamaya*. In line with *Visamaya*, we are unable to agree with the submissions by the first respondent. The first respondent in its written submissions had referred to s 108 of the National Land Code and the High Court's decision in *The Ordinary Co Sdn Bhd v Lembaga Rayuan Negeri Selangor & Anor* [2014] 7 MLJ 705 to argue that, where local authority planning restrictions are inconsistent with the express condition in the register document of title, such planning restriction shall not have any legal effect. Section 108 of the National Land Code is not applicable to the instant case as that provision concerns a conflict between the National Land Code and any by-law of or restriction imposed by a local authority. It has no application to the issue of conflict between the National Land Code and other laws passed by Parliament, that being the TCPA and the LCA in the instant appeal.

[242] In its reasoning as to the TCPA prevailing over the National Land Code in the event of an inconsistency, the Court of Appeal in *Visamaya* emphasised on the fact that the TCPA was passed subsequent to the National Land Code. We wish to iterate that the timing of when other laws were passed is not the sole or determinative factor in deciding whether unrestricted land use in a title document is subject to other applicable statutes. In the instant appeal, the fact that the National Land Code was passed subsequent to the LCA does not ipso facto negate the reservation of the subject land as 'hill land' under the LCA from having any effect.

[243] The first respondent cannot shield itself from the application of the TCPA and LCA on the reason that the subject land was a first grade freehold title without any restriction of land use. Possession of land title does not entail that the owner of the land has a blank cheque to do whatever he or she pleases with the land. This would have the potential of allowing for unsustainable development outside the purview of the TPCA and the LCA. This in turn would defeat the very object and purpose of both the TCPA and LCA, and hence negate the intent of Parliament in enacting those statutes.

[244] In similar vein, this court has established in the context of different legislation that the category of land use is not absolute and does not override the application of other regulatory laws: *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2020] 1 MLJ 211; [2020] 1 CLJ 34 which was in relation to the Street Draining and Building Act 1974, and *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16; [2020] 10 CLJ 285 ('Innab Salil') which concerned the Strata Management Act 2013.

[245] Although both cases concern different regulatory context, the underlying principles are applicable to our instant appeal. The express

condition on the issue document of title must be read subject to the relevant regulatory laws in place. The right provided under the issue document of title is not absolute. As stated by this court in *Innab Salil*:

> [33] To resolve the apparent conflict between s 120 of the NLC and s 70 of the SMA 2013, *the provisions must be read harmoniously such that they do not diametrically contradict each other. The effect of harmonious construction of these two provisions is this: the grant of powers or rights by one particular provision in a law does not mean that such rights may not at the same time be restricted by other provisions of the law*. Hence, simply because the state authority has issued conditions and restrictions of use in the tit le of the land, that does not preclude the management corporation from promulgating further rules, regulations or by-laws for the purposes provided for by law, in particular the purposes stipulated in s 70(2) of the SMA 2013. (Emphasis added.)

[246] The absence of an endorsement on the land title, namely that there was no endorsement that the subject land was reserved as 'hill land' under the LCA, does not equate as a basis for creating a legitimate expectation that there would be no restrictions to the proposed development of the subject land. Where a title document does not stipulate that an environmental impact assessment must be conducted, does that mean that the owner is exempted from complying with the Environment Quality Act ? That surely cannot be the position of our law.

[247] The general rule with regard to legitimate expectation is that it is not ordinarily available against the government, nor is the government bound by any representation which may have been made expressly or by conduct which if needed to be acted upon would invoke a breach of statute: (see the Court of Appeal decision in *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116, and Federal Court decision in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 at p 127 per Abdoolcader FJ). It was established by this court in *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 4 CLJ 729 that:

> whether or not the doctrine of legitimate expectation applies depends on the facts of each case, it *cannot and should not override the express statutory power vested in the state authority*. (Emphasis added.)

[248] In the instant appeal, the state authority is vested with the express statutory power under s 10 of the TCPA to approve and enact a structure plan, as well as the express statutory power under s 3 of the LCA to reserve an area of land as 'hill land'. The absence of an endorsement stipulating the relevant restrictions under the TCPA and LCA does not mean that there was a clear and unambiguous representation by the state authority that the TCPA and LCA

had no application, in particular that the reservation as 'hill land' under the LCA had no effect. In line with the position in *Hotel Sentral (JB)* and *Yap Chong Lan*, if the state authority had made such a representation, acting upon such a representation would be in breach of both the TCPA and LCA. For clarity, and for the reasons we have just stated, we are not persuaded by the first respondent's attempt to rely on the *Pelan Dasar* as a basis for establishing a legitimate expectation.

[249] In view of the foregoing, we conclude that the High Court and Court of Appeal erred in law when those courts found that the first respondent had a legitimate expectation, and that land use stipulated in the title document superseded the application of the TCPA or the LCA. As such, the local authority's decision in the granting of planning permission prior to the excision of the subject land as 'hill land' was ultra vires and, hence, void.

[250] We now turn to the questions of law in respect of which leave was granted:

(a) On the interpretation of provisions in statutory development plans

Question 1: Whether a court, in determining whether or not planning permission granted by a local authority contravenes any provision of the relevant development plan as provided by s 22(4) of the Town and Country Planning Act 1976, must have regard to the overall context of the development plan and adhere to the broad purpose of the guidance it provides; and address any particular problem (such as hill slope development) in that context as established by the UK Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another* [2017] 4 All ER 938.

Answer: Yes

Question 2: Whether a court is correct in law in giving primacy to the directions and/or guidelines issued by a State Planning Committee and/or a State Planning Director over and above the provisions in a statutory development plan — given that such a plan is an environmental contract accorded statutory force which has gone through an elaborate consultative and democratic process prescribed by ss 2, 7, 8, 9, 10 and 11 of the TCPA 1976 — having regard to contrary decisions on this point by:

(i) the UK Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another* [2017] 4 All ER 938 and *Westminster City Council v Great Portland Estates Plc* [1985] AC 661;

(ii) the Irish Supreme Court in *The Attorney General and others v Sligo County Council* [1991] 1 IR 99; and

(iii) the Malaysian Court of Appeal in *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1.

Answer: No

Question 3: If question 2 is answered in the affirmative, whether non-statutory directions and/or guidelines issued by a State Planning Committee and/or a State Planning Director can be interpreted in a manner which 'displaces or distorts' and/or dilutes the 'broad purpose of the particular problem' introduced in a statutory development plan in view of the principles in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another* [2017] 4 All ER 938 as well as the Federal Court decision in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 3 MLJ 466; [2021] 4 CLJ 775.

Answer: No answer required.

Question 4: Whether an exception and/or proviso to a general provision must be interpreted to 'befriend the general provision and disfavour the exception', as enunciated by the Indian Supreme Court in *Agricultural and Processed Food v Oswal Agro Furan* IR 1996 SC 1947, and not howsoever otherwise.

Answer: No answer required.

(b) on the application/role of local zoning plans:

Question 5: Whether, in the absence of a gazetted local plan for the area under the authority of the Majlis Bandaraya Pulau Pinang, the structure plan for the area would prevail or whether any other zoning plans created prior to the structure plan could be presumed to take the place of a local plan under the TCPA, despite not having undergone the process of public participation and approval as set out in Part III of the TCPA.

Answer: Yes the structure plan would prevail.

Question 6: If the answer to question 5 is yes, then in view of s 15(5) of the TCPA which provides that 'A local plan shall conform to the structure plan', whether the portions of the zoning plan which contravene and/or fail to conform with the structure plan should be treated as null and void and of no effect whatsoever.

Answer: Portions of the zoning plan i.e. the local plan, which contravene the structure plan cannot be relied upon.

(c) on the duties and functions of the State Planning Committee (State Planning Committee):

Question 7: Whether the State Planning Committee established under s 4 of the TCPA 1976 can bypass the overriding requirements of s 22(2A)(c) which requires the prior advice from the NPPC established under s 2A of the TCPA 1976 in respect of an application for planning permission which involves development in an environmentally sensitive

area; and the effect of the validity of any planning permission given in this context in disregard of the mandatory obligation of the State Planning Committee under s 22(2A)(c) TCPA.

Answer: No. Planning permission granted in contravention of TCPA is illegal and void.

Question 8: Whether a State Planning Committee can validly delegate its functions conferred on it by Parliament on a general wholesale basis to the local authority especially with regard to development in an environmentally sensitive area based on a cumulative reading of ss 2A, 4(4), 4(5), 20A, 22(2A)(c) and 22(4) of the TCPA 1976.

Answer: No

(d) the relationship between an express condition on issue document of title under the realm of land law and the limits of permitted land use under the realm of planning law:

Question 9: Whether an application for planning permission pursuant to s 22 of the TCPA 1976, is subject in planning law to planning regulatory laws which includes a statutory development plan and not limited or overridden by any express condition endorsed on the subject land's issue document of title pursuant to the National Land Code and the Land Conservation Act 1960 as answered in the affirmative by the Court of Appeal in *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 and in the negative by this Court of Appeal decision.

Answer: Yes in the instant case.

Question 10: If question 9 is answered in the affirmative, whether the principles established by the Federal Court decisions in *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2020] 1 MLJ 211; [2020] 1 CLJ 34 (relating to the Street Draining and Building Act 1974) and *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16; [2020] 10 CLJ 285 (relating to the Strata Management Act 2013) can be extended to planning law.

Answer: Yes in the instant case.

(e) the scope of supervisory jurisdiction of the court in a judicial review application against the decision of a planning appeal board:

Question 11: Whether a court, in an application for judicial review of the decision of the appeal board specially established under s 36 of the TCPA 1976 to resolve disputes on planning matters, may interfere with the decision of the appeal board on the question of how a relevant planning policy ought to be understood, in view of the finality clause housed in s 36(13) of the TCPA 1976 and further in the light of the principles set out by the UK Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another*

A [2017] 4 All ER 938.

Answer: No answer required.

(f) retrospective justification of an administrative decision:

Question 12: Whether a court in a judicial review application, where a B decision of a public authority is challenged, may rely on an event that occurs subsequent to the time of such decision (broadly, excision of land as 'hill land') to retrospectively justify the validity of the said decision.

Answer: On the facts of the present appeal, no.

C XV. CONCLUSION

[251] For the foregoing reasons, we conclude that the local authority's approval of the first respondent's application for planning permission was ultra vires and void.

D

[252] The High Court and Court of Appeal had erred in law in upholding the decision of the local authority to grant planning approval. For the reasons set out in the judgment, these appeals are allowed with costs.

E *Appeals allowed with costs.*

Reported by Nabilah Syahida Abdullah Salleh

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